Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL DOUGLAS GAGLIANO,
Petitioner,

v.

STORAGE TECHNOLOGY CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did petitioner present sufficient evidence below to establish prima facie case on his claims of age discrimination; reverse gender discrimination and disability discrimination to avoid summary judgment?

Did the district court commit reversible error when it excluded petitioner's tendered Exhibits 4, 5, 6, 7, 8, 9, 4-A and 8-A at the trial of the plaintiff's claim of unlawful retaliation?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceeding before the Tenth Circuit Court of Appeals.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Citations v

Opinion Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

A. Background of Material Facts 1

B. The Proceedings Below 11

Reasons for Granting the Writ 13

I. The Petition Should Be Granted Because the Opinions and Rulings Below Required Petitioner to Establish More Than Was Required Under McDonnell Douglas v. Green to Demonstrate a Prima Facie Case of Discrimination 13

II. The Petition Should Be Granted Because the District Court's Ruling on Petitioner's Tendered Exhibits Constituted Reversible Error and the Court of Appeals Decision Affirming Said Ruling Was Also Error 25

Conclusion 30

APPENDIX

Appendix A
Order and Judgment - Tenth Circuit of Appeals dated February 18, 1999 . . . . . 1a

Appendix B
Order Granting, in Part and Denying, in Part Defendant's Motion for Summary Judgment - United States District Court for the District of Colorado dated March 5, 1997 . . . . . 5a

Appendix C
Transcript of Motion Proceeding, February 27, 1997 - United States District Court for the District of Colorado 7a

Appendix D
Transcript of Trial Proceedings, Volume I - United States District Court for the District of Colorado, May 19, 1997 (pp. 1-16) 48a

Appendix E
Transcript of Trial Proceedings, Volume II - United States District Court for the District of Colorado, May 20, 1997 (pp. 100-112) 61a

TABLE OF CITATIONS

Armbruster v. Unisys Corp.,
62 FEP Cases 395 (E.D. a. 1993) 15

Bolton v. Scrivner, Inc.,
36 F.3d 939 (10th Cir. 1992) 22, 23

Cornevaux v. CUNA Mutual Insurance Group,
76 F.3d 1498 (10th Cir. 1996) 17

Cooper v. Asplundh Tree Expert Co.,
936 F.2d 1544, (10th Cir. 1988) 16

Craig v. Y&Y Snacks, Inc.,
721 F.2d 77 (3rd Cir. 1983) 19

Cumpiano v. Banco Santader Puerto Rico,
902 F.2d 148 (lst Cir. 1990) 19

Flowers v. Crouch Walker Corp.,
552 F.2d 1277, 1282 (7th Cir. 1977) 18

Hooks v. Diamond Crystal Speciality Foods, Inc.,
997 F.2d 793, (10th Cir. 1993) 17

Livingston v. Roadway Express, Inc.,
802 F.2d 1250 (10th Cir. 1986) 19

LaMontagne v. American Convenience Products, Inc.,
750 F.2d 1405 (7th Cir. 1984) 15

MacDonald v. Eastern Wyoming Center,
941 F.2d 1115 (10th Cir. 1991) . . . 15, 16, 17, 18

McDonnell Douglas v. Green,
411 U.S. 792 (1973) . . . . . *passim*

Nortari v. Denver Water Department,
971 F.2d 585 (10th Cir. 1992) 20, 21

Price v. Public Service Company of Colorado,
850 F.Supp. 934, 949 (D.Colo. 1994) 14

Thomas v. International Business Machines,
48 F.3d 478 (10th Cir. 1995) 17

White v. York International Corp.,
45 F.3d 357 (10th Cir. 1995) 22, 24

STATUTES CITED:

28 U.S.C. §1254 1

28 U.S.C. §1331(3) and (4) 1

29 U.S.C. §626(c) 1

29 U.S.C. §633a(c) 2

42 U.S.C. §2000e-5(f) 2

42 U.S.C. §12112a 22

42 U.S.C. §12117a 2

OTHER AUTHORITY CITED:

29 C.F.R. §1630.2(I) 23

Fed.R.Civ.P. 56 15

Fed.R.Evid. 803(6) 28

Fed.R.Evid. 803(24) 13, 27

Petitioner, Samuel Douglas Gagliano, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is unreported but is contained in the Appendix (App. A). The opinion of the district court is not published as it was a bench ruling a transcript of which is contained in the Appendix (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 18, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions **per se** involved in this petition as this petition concerns the evidence required to establish a prima facie case of age discrimination, gender discrimination, and disability discrimination and the propriety of the district court's refusal to admit petitioner's tendered exhibits at trial.

STATEMENT OF THE CASE

A. Background of Material Facts:

The petitioner commenced this action on July 26, 1996 in the United States District Court for the District of Colorado against the respondent alleging discrimination against him because of his age, sex and disability status when respondent terminated his employment. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331(3) and (4); 29 U.S.C. §§626(c)

and 633a(c); 42 U.S.C. §§2000e-5(f) and 12117a. The petitioner also alleged that he was retaliated against for engaging in the protected activity of threatening to file a charge of discrimination with the Equal Employment Opportunity Commission.

The petitioner, Samuel Douglas Gagliano, at the time of the filing of this action below, was a forty-nine year old citizen of the United States and a former employee of the respondent. The petitioner was continuously employed by the respondent from April 1, 1985 to February 5, 1993 in the position of Senior Human Resources Representative. Prior to his employment with the respondent the petitioner had several years' experience with other employers in the field of human resources.

The petitioner was initially employed by the respondent at its facility located in Palm Bay, Florida and was laid off on April 1, 1991. Within a matter of a few days of his layoff the petitioner learned of a vacancy as a Senior Human Resources Representative at the respondent's facility located in Louisville, Colorado. The petitioner made an informal inquiry about the position, was interviewed for same and subsequently hired in that position thus avoiding any break in his employment. During the course of his tenure at the Louisville facility the petitioner contended that he performed his duties in a satisfactory manner, despite abusive treatment from his immediate supervisor, Jim Hartsfield who would oftentimes remark to him that he was "inflexible" because of his lengthy experience in the field of human resources. These remarks indicated that Hartsfield had little regard for his lengthy experience and that he considered the petitioner to be an older worker who was unable to adapt to change. As a result of the difficulties with Hartsfield, the petitioner voluntarily sought mental health treatment in April of 1992 and engaged in mental health therapy during most of 1992 and continued in such treatment until mid-1993 several months after his termination. The petitioner was diagnosed as suffering from dysthymia and post traumatic stress syndrome, both recognized mental disorders, as a result of his employment difficulties with Hartsfield and some

unpleasant experiences as a child. The petitioner's involvement in mental health therapy was common knowledge within the organization that he worked as he was encouraged, as part of his therapy, to discuss his therapy openly and freely with others. The petitioner advised Hartsfield's peer managers (Tonda Franklin and Mike O'Neal) and Hartsfield's superior (Tavia Campbell) that he was undergoing therapy.

On January 21, 1993 the petitioner was informed of his layoff by Hartsfield and was not allowed to work from that date to the effective date of his layoff, February 5, 1993. After he received the notification, but prior to the effective date of his termination, because of the state of his mental health, the petitioner requested a reasonable accommodation in the form of being placed on medical leave but this request was denied. In December of 1992, prior to his termination, the petitioner made a request to Mike O'Neal, his personal human resources representative, that he do whatever he could to effectuate a transfer of the petitioner away from Hartsfield. Despite petitioner's request, Mr. O'Neal made no effort to effectuate a transfer thus denying the petitioner's request for a reasonable accommodation.

The established practice of the respondent, when making layoff decisions, was to evaluate and rank the employees who were being considered for layoff. This process was accomplished by a review of the last two annual written performance evaluations of employees within the same or similar classification and organization being considered for layoff resulting in a rank order to be reviewed by the EEO Manager to determine whether there was any adverse impact upon any protected group. This established layoff practice of the respondent was not employed in the decision to terminate the petitioner but instead a paired comparison or forced ranking method was employed. This method was used for that first time in the Human Resources department and was contrary to the past practices described above. The paired comparison method involved first deciding which employees

within the same or similar classification would be considered for layoff and then comparing the employees within the group, one against the other, using, in this particular case, the subjective traits of "flexibility", "centralization", "attitude" and "ability and willingness to grow". The employees were then ranked, highest to lowest, with the rank determined by the number of times that the employee's name appeared in the comparison chart. The employee whose name appeared most often would be ranked highest.

In its motion and supporting brief filed with the district court, the respondent represented to the district court that petitioner's layoff was based upon an assessment of his last two formal written job performance evaluations. The petitioner challenged the respondent's representation that this was the method employed in his termination. The petitioner had contended that this procedure should have been utilized in his case. However, the method that was actually employed to determine the layoffs to be made from the petitioner's unit was the above-described paired comparison method which was a deviation from the established company-wide past practice. At the oral argument on its motion for summary judgment, the respondent, for the first time, acknowledged that the method employed in the case of the petitioner's termination was the paired comparison method. As a result of the respondent's use of the paired comparison method, the petitioner was ranked lowest of the group and another older co-worker, Dan Fernandez, was ranked second-lowest and was also laid off. However, Mr. Fernandez was afforded the benefit of an "easy out" letter which provided compensation in exchange for a relinquishment of any right to pursue legal action against the company. Such consideration (easy out) was denied to the petitioner.

A few days after being advised of his termination, but prior to the effective date of his termination and while still an employee of the respondent, the petitioner initiated the first step in the respondent's internal appeals procedure, commonly referred

to as an "open door", by verbally complaining to Ms. Franklin, the respondent's EEO Manager. In a meeting with her petitioner complained about several issues including seniority, length of service to the company, experience, and the failure of the supervisors of which she was one to employ the layoff formula that had been previously established and always used in the past to determine who would be laid off. Along with Ms. Franklin, Mr. Hartfield, Mr. O'Neal and Ms. Campbell participated in the decision to lay off the petitioner. He also complained to her that his performance appraisal and experience versus the performance appraisals and experience of Jean Epstein, Bev Bellamy, Barbie Rucker and Carol Vandemoer, the other, substantially younger female human resources representatives who were retained, were not taken into consideration in the layoff decision. He also pointed out to Franklin that all the females referred to above had less than one year's experience as human resources representatives. He further advised Franklin that he should not have been laid off if the past established company-wide layoff method had been utilized.

The petitioner also discussed with Franklin his difficulties with Hartsfield consisting of his (Hartsfield) taking credit for work that petitioner had performed and his abusive treatment of him; his (Gagliano's) age, length of service and experience with the respondent and that of coworker Dan Fernandez since they were both over forty years of age and substantially younger than those who were retained; the apparent fact that no adverse impact study regarding age and sex was considered in the layoff decision; and also the fact that petitioner was in mental health therapy. He also expressed his interest in two organizational development positions that he learned, from an anonymous source, were available and vacant at the time of his layoff. These positions were in the same organization headed by Ms. Campbell, the Director of Human Resources to which petitioner's unit belonged.

During the course of this conversation with Franklin, the petitioner informed her that she had the duty and responsibility,

by virtue of her position as the EEO Manager, to consider the adverse impact of the layoff decisions with regard to age, race, sex, national origin or disability status. As indicated above, Franklin was part of the management team that decided to lay off the petitioner and, therefore, there was no "checks and balances" procedure using a disinterested third party to determine any adverse impact on any protected group. Additionally, the petitioner informed Franklin that four of the five persons laid off were over forty which was indicative of an adverse impact regarding age and further that four of the five persons laid off were males which was indicative of an adverse impact regarding sex.

The petitioner then threatened to file a charge of discrimination with the Equal Employment Opportunity Commission if he was not reinstated or considered for the two newly created organizational development positions.

At the time Hartsfield notified petitioner of his layoff on January 21, 1993, despite the fact that these two positions had just been created and were available, Hartsfield made no mention whatsoever of these two positions to him. The petitioner learned of the availability of these two positions a few days after receiving his layoff notification but before his face-to-face meeting with Franklin as a result of a document received from an anonymous source which indicated that these positions had just been created and were available.

It was the published policy of the respondent to fill vacant positions with qualified persons using a system of rank order of categories of employees within the company. Employees who were returning from military service would be considered first for any vacant positions and employees facing layoff second. The petitioner fell within this second category of employees and, because he was qualified for these two organizational development positions, he should have been considered for them.

The respondent asserted that petitioner had the benefit of

a so-called "re-deployment" period. Contrary to this assertion, the petitioner was not afforded the benefit of the "re-deployment" period. Historically, the "re-deployment" period entailed the following: (1) the affected employee is notified of layoff; (2) he is given a definite period of time to find another job within the company for which he is qualified during which period he is allowed to remain on the respondent's premises and use the resources of the respondent to make job searches within the company; and (3) at the end of this "re-deployment" period, if the employee is unsuccessful in finding another position within the company for which he is qualified, he is then asked for his company badge and keys and escorted off the respondent's premises. The petitioner, as a Senior Human Resources Representative, had previously been intimately involved in numerous layoffs of other employees from organizations within the respondent's Palm Bay and Louisville facilities including his own layoff from the Palm Bay facility in April of 1991. Such involvement consisted of counseling supervisors and managers which he routinely serviced in making layoff decisions within their units to ensure that the decisions that were to be made were fair and not in violation of any anti-discrimination laws. In petitioner's case, he was notified of his layoff and required to turn his company badge and keys and leave that same day.

Historically, the respondent ceases business operations during the Christmas/New Year's holiday season. During the 1992 holiday shutdown, shortly before petitioner's layoff, he met with his personal human resources representative, O'Neal, who was a peer manager of Hartsfield from the same human resources organization headed by Campbell. During this meeting, the petitioner had also requested that he investigate the continuing difficulties that petitioner was having with Hartsfield and asked him to do whatever he could do to effectuate a transfer for petitioner. Mr. O'Neal expressed a reluctance to do so and never did anything with regard to the request.

Following the chain-of-command, after O'Neal failed to

address his concerns, the petitioner chose to go to the next level of the internal appeals process and discussed his concerns with the Director, Ms. Campbell. She scheduled a meeting with him on the very day he was to be informed of his layoff. The petitioner was unaware of his impending layoff at the time she scheduled the appointment. Early in the morning of the day of the layoff but before the petitioner was actually informed of the decision, Campbell contacted him, canceled the meeting, and rescheduled it to a day after he would have been notified of the layoff decision and required to turn in his badge and keys and leave the company's premises. The petitioner contended that Campbell clearly knew that he would be laid off and escorted off the respondent's premises since she participated in the decision to lay him off and, therefore, purposely rescheduled the meeting with him knowing he would not be allowed on the premises.

The petitioner did not formally apply for the two organizational development positions that became available shortly before his layoff because such application was not necessary. While the petitioner was working for the respondent during his re-deployment period after he was notified of his layoff in Palm Bay, Florida in 1991, the petitioner was considered for a position in New York City as the Eastern Regional Human Resources Manager and the position to which he ultimately transferred to in Louisville without any necessity of formally applying for either position. During the course of his meeting with Franklin a few days after he was notified of his layoff, he did, in fact, express to her that he was interested in the two organizational development positions and also during the course of the continuation of his open door appeal and expressed the same to Bud Sleek, the Vice-President of Human Resources and Ryal Poppa, the Chief Executive Officer.

The organizational development unit was supervised directly by Campbell. While he was employed in Palm Bay, Florida, as the only human resources representative, the petitioner spent considerable time performing organizational development

duties and responsibilities and considered himself qualified based on this experience. After the petitioner mentioned the availability of these two organizational development positions to Franklin, she volunteered information to him that a Mr. Pat Curran, another Human Resources representative, who was also laid off from another organization within the company's overall human resources function and who was substantially younger than the petitioner, was allowed to interview for the organizational development positions. Curran was also allowed to remain on the company's premises during his redeployment to search for another position within the company. Furthermore, Curran was also afforded the benefit of an "easy out" letter like Fernandez after he was unsuccessful in finding another position within the company. Franklin was very much aware of the petitioner's extensive experience and capabilities because she was the person who offered him the above-referenced position of Eastern Regional Human Resources Manager in New York City.

The petitioner also asked Franklin why he and Fernandez had not been informed of the availability of the two organizational development positions or given an opportunity to interview for them and she could not give him an answer or explanation. The petitioner was never allowed to interview for the two positions at any time.

As indicated above, during his meeting with Franklin, the petitioner threatened to file a charge of discrimination with the EEOC if he was not reinstated or considered for the two organizational development positions. Franklin advised him that she would investigate the issues he raised, speak with Campbell and instructed him to contact her later. The petitioner contacted Ms. Franklin by telephone as requested. She advised the petitioner that she had spoken to Campbell regarding his concerns and that it was Campbell's position that he would not be considered for the two organizational development positions or any position because he had threatened to file a charge with the EEOC.

The respondent contended that the petitioner' termination was the result of a reduction-in-force and that the method employed to make such decisions were legitimate and non-discriminatory despite the fact that it deviated from the past practice described above.

In the organization in which the petitioner worked there was no reduction in head count and, therefore, no actual reduction-in-force. This organization, headed by Campbell, experienced no reduction in the number of employees since there were two employees laid off, the petitioner and Fernandez, while at the same time, two organizational development positions were added to the organization. Furthermore, immediately thereafter, the employee head count actually increased due to the fact that Debbie Coyle, a female who was employed as a secretary, was immediately given human resources representative responsibilities previously performed by the petitioner and subsequently promoted to the position of Associate Human Resources Representative. When Coyle was promoted, the secretary position which she left was filled by a female from outside the company. Finally, just prior to the petitioner's termination, another female, Carol Vandemoer, was also brought into the Human Resources Organization under Campbell from the Compensation Department. The petitioner and Fernandez were laid off and there were four positions which were created or added (the two organizational development positions, one of which was filled by a female, the secretary position filled by a female, and the added position held by Vandemoer, a female.)

After being advised by Franklin of Campbell's decision, the petitioner continued the appeal which he had verbally started with Franklin prior to the effective date of his termination by taking his concerns about the manner in which the decision to terminate him was made to Sleek and Poppa. The bases upon which the petitioner was contesting his termination were put forth in a formal written appeal document submitted to both officials pursuant to the open door appeals process. The petitioner did not

receive a response to the continuation of his appeal from Sleek but later received a communication from Poppa who scheduled a meeting with him at which time he made a presentation regarding all of his concerns about discrimination including the manner and method used to terminate his employment, the failure to consider him for the two organizational development positions, and the retaliation taken against him because he threatened to file a charge with the EEOC. Poppa advised the petitioner that he would have his concerns investigated and asked him for the names of three witnesses who may have relevant information which he provided. However, neither the petitioner nor any of the witnesses whose names he provided were ever contacted. The only persons contacted were Sleek, who had no first-hand knowledge of petitioner's concerns, Campbell and O'Neal who were part of the management group responsible for the termination decision. Poppa later advised the petitioner in writing on June 21, 1993 that the decision would stand. The petitioner continued with his appeal by writing another letter to Poppa on July 30, 1993 setting forth a rebuttal to the respondent's contentions as set forth in Poppa's written decision and then later writing a letter to Laurie Dodd, who later became the Vice President of Human Resources replacing Sleek.

After his unsuccessful appeal to Sleek and Poppa, the petitioner, on June 23, 1993, filed a formal charge of discrimination with the EEOC and this action was filed after petitioner received his notice of right-to-sue.

B. The Proceedings Below:

As indicated above, the petitioner commenced the action below on July 26, 1996. On August 12, 1996, the respondent filed its Answer generally denying the petitioner's allegations and additionally asserting several affirmative defenses. The parties completed discovery and the matter was set for a jury trial which was ultimately held on May 19-22, 1997.

The respondent filed a motion for summary judgment with

supporting brief and documents on January 10, 1997. On February 3, 1997 the petitioner filed his memorandum brief and supporting documents in opposition to the motion. On February 27, 1997 the district court heard oral argument from the parties on the motion and issued a ruling from the bench granting the motion as to the petitioner's claims regarding age, sex and disability discrimination leaving for determination at trial only the retaliation claim. (App. C)

On March 7, 1997 the respondent filed a motion in limine requesting exclusion of certain documentary evidence anticipated to be offered by the petitioner. The exhibits which were objected to by the respondent consisted of the documents submitted by the petitioner to respondent's officials during the course of his pursuing the company's open door appeals process. The contested exhibits are described later in this petition.

On the first day of trial the district court refused the admission of petitioner's Exhibit's 4, 5, 6, 7, 8, and 9. The petitioner offered these exhibits, prepared by him pursuant to the company's appeal procedure as contemporaneous recordings of the petitioner's recollections of the events which occurred subsequent to his notification of layoff and as business records. The respondent objected to the admission of these exhibits asserting that they contained numerous references to the petitioner's claims of age, sex and disability discrimination which had previously been dismissed. The petitioner argued for the admission of the exhibits on the basis that they were contemporaneous recordings of the events at issue as recorded by him and business records and suggested to the district court that it could simply advise the jury that the court was to rule on the dismissed claims that were referred to in the exhibits and that the jury's task was simply to rule on the retaliation claim. The district court declined to accept petitioner's suggestion and refused to admit the exhibits. During the evening recess, petitioner prepared modified versions of petitioner's Exhibits 4, 6, 7, 8, and 9 redacting any references to the age, sex and disability claims.

These exhibits were re-designated as petitioner's Exhibits 4-A, 6-A, 7-A, 8-A and 9-A. Petitioner's original Exhibit 5 was not modified and resubmitted since it contained no references to the retaliation claim. On May 20, 1997 the petitioner offered Exhibits 4-A, 6-A, 7-A, 8-A and 9-A. Exhibit 5 was not offered for the reason stated above. The district court admitted Exhibits 6-A and 9-A but excluded Exhibits 4-A, and 8-A. Exhibit 7-A was stipulated into evidence by the parties. The district court excluded Exhibit 4-A as not being contemporaneous and Exhibit 8-A was not being contemporaneous and far outside the time frame in issue. Both of these documents were prepared by the petitioner pursuant to the company's appeals procedure.

The retaliation claim was tried to the jury on May 19 - 22, 1997 after which the jury returned its verdict in favor of the respondent. On May 22, 1997 judgment was entered on the jury's verdict and the district court's previous orders. On June 20, 1997 the petitioner filed a timely notice of appeal appealing the jury verdict and the district court's decision on the respondent's motion for summary judgment.

After receiving the briefs of the parties and hearing oral argument from counsel for the parties, the Tenth Circuit Court of Appeals affirmed the district court's ruling on the respondent's motion for summary judgment finding that the petitioner failed to establish prima facie cases of age, gender or disability discrimination and also affirmed the district court's ruling at trial refusing to admit into evidence petitioner's tendered exhibits finding no abuse of discretion and agreeing with the district court's determination that the exhibits were hearsay, not contemporaneous recordings, did not bear the necessary hallmarks of reliability under Rule 803(24) and were not business records in any sense of the term. (App. A)

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS AND RULINGS BELOW REQUIRED

PETITIONER TO ESTABLISH MORE THAN WAS REQUIRED UNDER MCDONNELL DOUGLAS V. GREEN TO DEMONSTRATE A PRIMA FACIE CASE OF DISCRIMINATION.

The district court granted respondent's motion for summary judgment finding that the petitioner had failed to establish a prima facie case of age discrimination, gender discrimination or disability discrimination which ruling was affirmed by the Court of Appeals on all three claims.

A. Petitioner's Claim of Age Discrimination.

In his Complaint the petitioner asserted several theories of disparate treatment discrimination one of which was a claim of age discrimination under the ADEA regarding his termination. As indicated above, the district court granted the respondent's motion for summary judgment on the petitioner's claim of age discrimination. The district court held that the petitioner must establish a prima facie case pursuant to Price v. Public Service Company of Colorado, 850 F.Supp. 934, 949 (D.Colo. 1994) which required establishment of the following: (1) that he is a member of the protected group; (2) that he was doing satisfactory work; (3) that he was discharged; and (4) that the employer discriminated against him on the basis of age. (App. C at 34a) This test is that which is applied to the facts in reduction-in-force situations. The district court further indicated that this case is somewhat different from a reduction-in-force case because the petitioner asserted that younger persons were retained who took over his job functions. The district court appeared to distinguish cases of a reduction-in-force and a routine case of age discrimination but then indicated that there was little difference. The district court, therefore, analyzed the petitioner's age discrimination claim under a theory of disparate treatment in a reduction-in-force setting. During the course of its analysis, the district court made the factual determination that the managers involved in the decision to terminate the petitioner's employment were unaware of the fact that petitioner was over forty years of

age and, therefore, a member of the protected class under the ADEA and further found that since the decision makers were unaware of the petitioner's age there can be no issue of material fact.

Direct evidence of age discrimination is, in almost all cases, difficult to come by. See Armbruster v. Unisys Corp., 62 FEP Cases 395 (E.D. Pa. 1993), aff'd in relevant part at 32 F.3d 716 (3rd Cir. 1994). When such evidence exists, it is likely to be under the control of the employer and a plaintiff employee may not succeed in turning such evidence up. See LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984). Under Fed. R.Civ. P. 56, the petitioner was entitled to all possible reasonable inferences from the evidence as the non-moving party. On the subject of inferences, the Tenth Circuit in MacDonald v. Eastern Wyoming Center, 941 F.2d 1115 (10th Cir. 1991) stated as follows:

> "We must view the evidence and any possible inference most favorable to the non-moving party to ascertain whether a genuine issue of fact exist." (Emphasis added)

In this instance, the district court did not afford the petitioner the benefit of the possible reasonable inferences to which he was entitled. In his affidavit supporting his brief in opposition to the respondent's motion for summary judgment, the petitioner stated that during the course of his frequent interaction with his supervisor, Hartsfield, beginning from the onset of his supervision of the petitioner, often stated to him that he was "inflexible" because of his lengthy experience in the field of human resources. Petitioner also stated in his affidavit that Hartsfield made it emphatically clear to him that he had little regard or respect for his lengthy experience in the field of human resources indicating that he considered him to be an older worker who could not adapt to change. As indicated above, direct evidence of age discrimination is hard to come by and rare is the case where the employer makes blatant comments of age discrimination.

However, heeding the advice of the Tenth Circuit in MacDonald v. Eastern Wyoming Center, the evidence should have been afforded any possible inference favorable to the petitioner to ascertain whether a genuine issue of fact existed. From the comments of petitioner's supervisor as indicated above, a possible, reasonable inference that could be drawn from these often-made comments would be direct evidence that Hartsfield harbored discriminatory animus against the petitioner because of his age.

As with other types of discrimination, age discrimination can be established by indirect evidence through the three-part framework as set out in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and it progeny. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 n.1 (10th Cir. 1988). Although somewhat unclear from the record, it appears that the district court analyzed the petitioner's age discrimination claim using the reduction-in-force approach. The petitioner contended that there was no actual reduction in head count which would normally be found in a true reduction-in-force setting. In further support of his contention, the petitioner also pointed out the fact that the normal, established company-wide practice used in determining layoffs, whenever the company was undergoing a true reduction-in-force, required a review of the last two written performance evaluations of each of the employees considered for layoff and then ranking these employees based upon the performance levels as set forth in their written performance evaluations. In the case of petitioner's termination, the respondent used the "paired comparison" method as described above which resulted in the layoff of two male employees - the petitioner and Fernandez - who were the oldest employees in the unit with the most experience. Since the facts as asserted by the petitioner established that his termination was not made within the confines of a true reduction-in-force setting, he was entitled to have his claim determined by the McDonnell Douglas three-step analysis commonly used in routine discharge cases. In MacDonald v. Eastern Wyoming Center at 1119 the Tenth Circuit citing Cooper v. Asplundh Tree Expert Co.,

delineated the prima facie case to be employed in such settings requiring a plaintiff to demonstrate the following: (1) that he is a member of the protected group; (2) that he was performing satisfactorily; (3) that he was discharged; and (4) that he was replaced by a younger worker. See also Cornevaux v. CUNA Mutual Insurance Group, 76 F.3d 1498 (10th Cir. 1996); Thomas v. International Business Machines, 48 F.3d 478, 484 (10th Cir. 1995) and Hooks v. Diamond Crystal Speciality Foods, Inc., 997 F.2d 793, 799 (10th Cir. 1993). Furthermore, in MacDonald v. Eastern Wyoming Center at 1119 the Tenth Circuit Court also stated as follows:

> "Moreover, concluding that the MacDonalds did not establish a prima facie based on the reasons for their discharge raises serious problems under the McDonnell Douglas analysis, which mandates a full and fair opportunity for a petitioner to demonstrate pretext. Short-circuiting the analysis at the prima facie stage frustrates a petitioner's ability to establish that the respondent's proffered reasons were pretextual and/or that age was the determining factor; if a petitioner's failure to overcome the reasons offered by the respondent for discharge defeats the petitioner's prima facie case, the court is then not required to consider petitioner's evidence on these critical issues"

It is unclear whether the district court determined that the petitioner had failed to establish a prima facie case or, on the other hand, whether he failed to show, in the district court's opinion, that the proffered explanation of the respondent was pretextual. However, the Court of Appeals, in affirming the district court's ruling, ruled that the petitioner failed to establish the fourth prong of the McDonnell Douglas prima facie test. (App. A at 3a) However, the inference that can be drawn from the district court's comments from the bench is that the petitioner failed to establish a prima facie case since the district court made

reference to the fact that the petitioner was not replaced by a significantly younger co-worker. (App. C at 35a) This finding was erroneous as all of the petitioner's duties were assumed by significantly younger persons. The reasonable conclusion therefore is that the district court found that the petitioner had failed to establish a prima facie case. Thus, as in MacDonald v. Eastern Wyoming Center, the petitioner's ability to establish that the respondent's proffered explanation was pretextual was frustrated since the analysis was short-circuited by the apparent finding of the district court that the petitioner had failed to establish a prima facie case.

The petitioner submits that he did, indeed, establish a prima facie case of age discrimination under McDonnell Douglas. Employing the test set forth in MacDonald v. Eastern Wyoming Center, the petitioner satisfied the first prong of the test since he was over forty years of age. Second, the petitioner established that he was qualified despite the respondent's contention to the contrary by virtue of his previous written performance evaluations for the rating periods 1989-90, 1990-91 and 1991-92 which reflected that his performance was within the satisfactory to above average range. Third, the petitioner was clearly terminated from his employment despite the respondent's use of the term "layoff". This contention on this third element is further bolstered by the respondent's action of requiring that the petitioner permanently leave the premises of the respondent on the day that he received his so-called layoff notification and his being deprived of the re-deployment period customarily granted to employees in the petitioner's circumstance to find other employment within the company. With regard to the forth element of the prima facie case the petitioner would submit that it is not required that he actually be replaced by a younger co-worker but this element is satisfied by fact that a sizable portion of the petitioner's duties were assigned to a clearly younger co-worker, Ms. Coyle. Flowers v. Crouch Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977). Furthermore, the petitioner's duties obviously did not disappear and the reminder of his functions must have been performed by

younger co-workers since all of the human resources representatives who were retained were all significantly younger than the petitioner. Cumpiano v. Banco Santader Puerto Rico, 902 F.2d 148 (lst Cir. 1990). Therefore, the petitioner clearly established a prima facie case of discrimination. Furthermore, deviation (use of the paired comparison method) from the established layoff practice clearly can be considered to be evidence of pretext thus creating a genuine issue of material fact. See Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983).

As indicated above, the district court also based its determination on the erroneous finding that the "managers" were unaware that the petitioner was over forty years of age. In his affidavit supporting his brief in opposition to the respondent's motion for summary judgment, the petitioner indicated that Franklin, the EEO Manager, was apparently unaware of the fact that he was over forty years of age although she should have been in her capacity as the EEO Manager. However, Franklin was only one of several managers who participated in the decision to terminate the petitioner's employment, namely, Hartsfield, O'Neal and Campbell, and, therefore, the district court's finding that the "decision makers" (plural) were unaware of the petitioner's age is clearly erroneous. (App. C at 35-36a) The Tenth Circuit on appeal did not disturb the findings of the district court in its affirmation of the district court's ruling.

B. Petitioner's Reverse Sex Discrimination Claims.

As indicated above, the petitioner also raised a claim of reverse sex discrimination claiming that female employees in his general classification with less experience and length of service to the company were retained while he was terminated. In its analysis of this particular claim, the district court indicated that the petitioner had a very high threshold to meet because, under a theory of reverse discrimination, he was required to demonstrate through the presentation of background evidence that the respondent was that unusual employer who discriminated against the majority citing Livingston v. Roadway Express Co., 802 F.2d

1250 (10th Cir. 1986) and Nortari v. Denver Water Department, 971 F.2d 585 (10th Cir. 1992). The district court was apparently suggesting that the petitioner was required to produce evidence of historical background demonstrating that the respondent was an employer who discriminated against the majority as part of his prima facie case.

In Nortari v. Denver Water Department, the Tenth Circuit, in its analysis of this question of requisite background circumstances, stated as follows:

> "In this case, the district court correctly found that Nortari failed to even allege that the requisite background circumstances were present. Thus, Nortari may not rely upon the McDonnell Douglas formulation to state his prima facie case. That conclusion does not, however, end our review of this case. We must also decide whether a reverse discrimination plaintiff's failure to allege background circumstances necessarily compels a conclusion that he has failed to state a prima facie case of intentional discrimination. We must decide, in other words, whether a disparate treatment plaintiff's failure to demonstrate entitlement to the McDonnell Douglas presumption forecloses his opportunity to prove that he was a victim of intentional discrimination. We hold that it does not."

Nortari v. Denver Water Department at p.589. The Tenth Circuit in Nortari further stated at 590 as follows:

> "An employee who is the victim of intentional discrimination in such circumstances, and who adduces sufficient evidence of that discrimination should be permitted to proceed beyond the prima facie case stage of litigation. The McDonnell Douglas prima facie case formulation never

> operates to bar the claim of one who is a member of a historically disadvantaged group and who is truly a victim of intentional workplace discrimination that Title VII prohibits. Such an employee will always be able to carry their initial McDonnell Douglas burden. The formulation should not be allowed to operate as a bar to similarly victimized reverse discrimination claimants . . .
>
> . . . Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for the petitioner's status the challenged decision would not have occurred."

In Nortari, the Tenth Circuit remanded that matter to the district court to make an additional determination whether Nortari had adduced any evidence to support, as a reasonable probability, the inference that but for his gender he would had been promoted. In the instant case, the petitioner produced evidence that he, along with another older male employee, were the only two persons of the seven who were considered for layoff to actually be laid off. He further proved that all of the females retained had far less experience as human resources representatives than he. Further, the petitioner asserted that in the overall human resources organization, four of the five persons laid off were male. From this evidence a possible reasonable inference which could be drawn was that the employer was motivated by sex bias without having to prove historical background.

C. Petitioner's Claim of Disability Discrimination.

The district court, in its analysis of the petitioner's disability claim, indicated that he must establish the following: (1) he was qualified with or without a reasonable accommodation; (2) able to perform the essential functions of his job; and (3) that the employer terminated him because of his disability. The court

further noted that there was no probative evidence that the petitioner was disabled under the meaning of the ADA and stated further that a disability is defined as a physical or mental impairment that substantially limits one or more major life functions. In White v. York International Corp., 45 F.3d 357, 360 (10th Cir. 1995) the Tenth Circuit set forth the requirements that a petitioner must establish to qualify for relief under the ADA and with regard to these requirements the Court stated as follows:

> "Accordingly, to qualify for relief under the ADA, a petitioner must establish (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of his job; and (3) that the employer terminated him because of his disability."

ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."As indicated above, the district court found that there was no probative evidence that the petitioner was disabled under the meaning of the ADA. On this question, the Tenth Circuit in Bolton v. Scrivner, Inc., 36 F.3d 939, 942 stated as follows:

> The ADA prohibits discrimination against a "qualified individual with a disability" because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment. 42 U.S.C. §12112(a). At issue in this case is whether Bolton is an "individual with a disability." "The term 'disability' means, with respect to an individual - (A) a physical or mental impairment

> that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.

In the instant case, the petitioner submitted evidence to the district court that he had been in mental health therapy for most of the year 1992 and continued in said therapy until mid-1993 and that such engagement in therapy was necessary because of the mental stress that he was experiencing as a result of his interactions with his supervisor, Mr. Hartsfield. During his therapy, it was recommended to the petitioner that he freely and openly discuss his mental health treatment with others as part of his therapy and recovery process, which recommendation he followed. In that regard, he discussed his mental health therapy with his supervisor Hartsfield; his personnel human resources representative, Mike O'Neal; the EEO Manager, Tonda Franklin; and the Director of the Human Resources Department, Tavia Campbell. Based upon these communications to his managers, it is reasonable to infer that the petitioner had a record of such impairment and was regarded as having such impairment thus meeting the definition of a person with a disability as set forth in Bolton. As a result of this mental impairment, the petitioner was substantially limited in the major life function of "working." See 29 C.F.R. §1630.2(I). As a result of this limitation, which was based primarily upon the abusive treatment that he was receiving from his supervisor, Hartsfield, the petitioner requested a reasonable accomodation in the form of a transfer to another assignment so he would be out from under the abusive supervision of Hartsfield. Additionally, the petitioner requested a medical leave of absence after receiving the notification of his layoff on January 21, 1993. The petitioner concedes that his request for placement on medical leave was "tardy" as determined by the district court only in the sense that it was made after the notification. However, his request for a reasonable accommodation in the form of a transfer away from the supervision of Hartsfield was not tardy since such request was made during the Christmas/New Year's season in 1992,

approximately one month before he was notified of his layoff. Further, the petitioner's termination was not final when he requested medical leave since he was involved in the appeals process which had not yet run its course. The petitioner established that he was qualified to perform the essential functions of the job, with or without reasonable accommodation, due to the fact that he was performing at a satisfactory level. However, the mental stress was clearly affecting the petitioner which necessitated his request for a transfer. Thus, under White v. York International Corp., the petitioner established the first two prongs of the test which would have entitled him to relief under the ADA. Finally, the petitioner was required to establish the third prong of the test, namely, that the employer terminated him because of his disability. The petitioner's evidence to support that he had satisfied the third prong of the test consisted of the fact that he was unceremoniously marched off the premises of the respondent on the day of his notification of layoff and by virtue of the fact that his company badge and keys were demanded prior to his departure reasonably infers that the respondent's managers were concerned about his mental condition. Additionally, the petitioner offered evidence that Campbell, the Director of the Human Resources Department, scheduled a meeting with the petitioner which was to be held the same day of his notification of layoff but canceled such meeting prior to the petitioner's actual receipt of notification and then rescheduled the meeting with him to a date after which he would be basically banned from the respondent's premises. Further, the petitioner was denied the benefit of the redeployment procedure which would have allowed him to remain on the premises from January 21, 1993 (the day of notification of layoff) to February 5, 1993 (the effective date of his termination) to look for another position within the company. From this evidence, it can reasonably be inferred that the petitioner's mental state was a factor in his termination. Otherwise, why would he not be given the consideration enjoyed by other employees of being allowed to remain on the company's premises during the re-deployment period?

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S RULING ON PETITIONER'S TENDERED EXHIBITS CONSTITUTED REVERSIBLE ERROR AND THE COURT OF APPEALS DECISION AFFIRMING SAID RULING WAS ALSO ERROR.

A. The District Court Erred When it Refused to Admit Petitioner's Exhibits 4, 5, 6, 7, 8, 9, 4-a and 8-a.

As indicated in the statement of facts above, on the first day of trial, the district court granted the respondent's motion in limine and refused to the admit petitioner's Exhibits 4, 5, 6, 7, 8 and 9. (App. D at 58a)

Exhibit 4 was letter from the petitioner to Sleek the Vice-President of Human Resources, dated March 22, 1993 by which letter the petitioner continued to the next step of his internal appeal regarding his termination. This document contained the concerns which the petitioner had regarding the method manner in which his termination was effectuated and, in effect, reduced to writing in a contemporaneous fashion the events which had occurred with regard to his termination.

Exhibit 5 was a memo from the petitioner to Sleek dated April 5, 1993 supplementing the petitioner's initial letter to Sleek on March 22, 1993 which again contained his contemporaneous recordings of events which had occurred regarding his termination.

Exhibit 6 was a letter from the petitioner to Poppa, the Chief Executive Officer of the company, dated April 29, 1993 which was a further continuation of the internal appeal.

Exhibit 7 was a letter from the petitioner to Poppa dated July 30, 1993 which was basically a rebuttal to Poppa's letter of decision denying the petitioner's appeal dated June 21, 1993 which was an attachment to Exhibit 7. In this letter the petitioner

was still attempting to resolve the controversy.

Exhibit 8 was letter from the petitioner to Laurie Dodd, the Vice President of Human Resources who replaced Sleek, dated January 30, 1995, requesting reconsideration of the respondent's decision on his internal company appeal and which can be basically characterized as a last-ditch effort by him to resolve his issues with the company prior to commencing any litigation.

Finally, Exhibit 9 was a presentation format referred to as Symptom/Disease which was used in the petitioner's presentation to Poppa which also contained contemporaneous recordings of events which had occurred surrounding his termination.

The petitioner submits that all of these documents were prepared by him in his effort to follow, as best he could, the established internal appeal procedure of the company and such records were business records entitled to be admitted under the business records exception to the hearsay rule since he generated them pursuant to the company's policy. In his testimony at trial, the petitioner testified that his original notes from which the exhibits were prepared shortly after each event were destroyed in a fire in the state of Florida but nonetheless the offered documents should have been considered as contemporaneous recordings since all, with the possible exception of Exhibit 8-A, were prepared close in time to the actual occurrence of the events referred to in the documents. Nonetheless, all the tendered exhibits were business records and should have been admitted under the business records exception to the hearsay rule.

The respondent's primary objection to the admission to these exhibits was that they contained numerous references to the petitioner's claims of age, sex and disability discrimination which had previously been dismissed. The petitioner argued for the admission of these documents on the basis that they were contemporaneous recordings of the events in issue as recorded by him and were business records. As a suggestion to accommodate the concern of the respondent, petitioner suggested to the district

court that it could simply advise the jury that the court was to rule on the other claims that were referred to in the exhibits and that its task was to simply determine the retaliation claim which suggestion the district court declined.

The district court granted the respondent's motion to exclude the exhibits on the basis that the petitioner was capable of providing his own testimony about the events contained in the exhibits as opposed to attempting to provide such testimony through the use of the documents which the district court apparently considered to be hearsay. The petitioner submits that the excluded documents should have also been deemed admissible under Fed. R.Evid. 803(24) which provides as follows:

> "A statement possessing such circumstantial guarantees of truthworthiness is admissible if, in addition the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts, (C) the general purpose of the rules and the interest of justice will best be served by admission of the statement into evidence however, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

This particular rule has five basic requirements: (1) equivalence trustworthiness - this requirement is met because the petitioner had no motive to lie and he was clearly available for cross-examination; (2) necessity - the statement was probative on the points for which it was offered than any other evidence that the

petitioner could procure as there were his only written records; (3) material facts - the statements were offered as evidence of material facts which were at issue at the trial; (4) interests of justice - it is clear that the interests of justice, namely, searching for and finding the truth of the issues would have been served; (5) notice to the party opponent - this requirement was clearly met because these exhibits were previously identified in the pretrial order well in advance of the trial as evidenced by the fact that the respondent had filed, some months earlier, a motion in limine with regard to four of the five exhibits which were offered by the petitioner.

Recognizing of course that these particular recordings by the petitioner would not be considered to be routine recordings such as business receipts, etc., pursuant to the business operations of the respondent, however, as indicated above, the petitioner was making every effort to follow the respondent's internal appeals procedure and generated these documents in the furtherance of that effort. Therefore, these documents could reasonably be considered to be business records and therefore admissible under the business records exception to the hearsay rule as set forth in Fed. R.Evid. 803(6). As indicated above, the only exhibit of the group which could arguably be considered not to be contemporaneous was Exhibit 8. However, this document was a document clearly generated by the petitioner as the last step in his internal appeal and should also have been admitted for the reasons stated above. The exclusion of these exhibits by the district court clearly hindered the petitioner's effort to corroborate the claims which he was making at trial.

As indicated above, as a result of the district court's exclusion of Exhibits 4, 5, 6, 7, 8 and 9 on the first day of trial, the petitioner during the evening recess, attempted to redact from the exhibits any references to age, sex, disability discrimination which was the primary objection of the respondent and on May 20, 1997 offered redacted versions of Exhibits 4, 6, 7, 8 and 9 designated as 4-A, 6-A, 7-A, 8-A and 9-A leaving only those

references to the issue of retaliation contained in the exhibits. With regard to Exhibit 7-A, the petitioner offered only the attachment to the original Exhibit 7 which was Poppa's response to the petitioner setting forth his decision with regard to his termination. The cover letter which was petitioner's letter to Poppa dated July 30, 1993 which contained no reference to the issue of retaliation and was, therefore, not included.

Upon petitioner's offer of the revised versions, the district court, after hearing the arguments of counsel, excluded Exhibit 4-A on the basis that it was not a contemporaneous document and did not fall within any exception to the hearsay rule and excluded Exhibit 8-A as being well beyond the realm of being contemporaneous. (App. E at 61a) Exhibits 6-A and 9-A were allowed into evidence by the court and Exhibit 7-A was stipulated into evidence by the parties. It is clear that the district court excluded Exhibits 4-A and 8-A on the basis that they were not contemporaneous recordings of events by the petitioner. However, Exhibit 4-A was clearly contemporaneous as it was the first recording by the petitioner of the events which was submitted by him to the company to continue the internal company appeals process which he had verbally started with Franklin earlier in January. Exhibit 8-A, albeit prepared approximately a year and a half after the events, was clearly a continuation of the company appeals process by which exhibit the petitioner was attempting to make one last-ditch effort to resolve his controversy with the company to avoid costly litigation. Once again, the exclusion of these particular exhibits, Exhibit 4-A and 8-A deprived the petitioner of evidence which would corroborate his contentions. Furthermore, the jury was deprived of the opportunity to get the complete evidentiary picture as contemporaneously recorded by the petitioner of all the circumstances that surrounded his termination. A modified version of Exhibit 5 was not offered due to the fact that this particular exhibit made no reference to the issue of retaliation primarily for the reason that it was simply a supplementation of Exhibit 4.

The district court's exclusion of the above-referenced exhibits deprived the jury of the opportunity to consider all relevant, admissible evidence in its determination of petitioner's retaliation claim.

CONCLUSION

This petition for a writ of certiorari should be granted because the courts below applied requirements for the establishment of a prima facie case contrary to this Court's decision in McDonnell Douglas v. Green and because the exclusion of petitioner's tendered exhibits by the district court did not allow the jury to receive the complete evidentiary picture of petitioner's claims.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed February 18, 1999]

No. 97-1235
(D.C. 96-WY-1793-AJ)
(District of Colorado)

SAMUEL DOUGLAS GAGLIANO,
Plaintiff-Appellant,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware corporation,
Defendant-Appellee.

ORDER & JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **SEYMOUR**, Chief Judge, **BRORBY**, and **HENRY**, Circuit Judges.

Plaintiff Samuel Gagliano appeals from the grant of summary judgment in favor of the defendant, Storage Technology Corporation, on three employment discrimination claims: (1) age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; (2) reverse sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 12101-12213. He also appeals from the district court's decision to exclude several proffered exhibits at the trial on his related retaliation claim. We affirm in all respects.

As to the summary judgment rulings, Mr. Gagliano contends that the district court erred in applying the wrong prima facie test with respect to his age discrimination claim, inappropriately required the plaintiff to produce background evidence with respect to his reverse sex discrimination claim, and incorrectly concluded that the plaintiff had not created a prima facie case of disability discrimination. We review the district court's decision de novo, applying the same legal standards pursuant to Fed. R. Civ. Proc. 56(c). See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996).

After careful review of the record on appeal together with the parties' briefs and the applicable law, we conclude that the district court was correct in determining that Mr. Gagliano had not presented a prima facie case of age discrimination because he did not "produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that [Storage Technology] intended to discriminate in reaching the decision at issue." Branson v.

Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988). Mr. Gagliano failed the fourth prong of the familiar McDonnell Douglas analysis for employment discrimination claims. See McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802-04 (1973). Similarly, as to the reverse sex discrimination claim, the district court correctly found that Mr. Gagliano had not presented background evidence supporting the inference that Storage Technology discriminated against men nor sufficient indirect evidence that but for his gender he would not have been terminated. See Notari v. Denver Water Dep't, 971 F.2d 585, 588-89 (10th Cir. 1992). As to the ADA claim, the district court also correctly found that Mr. Gagliano had not established a prima facie case because he did not show that he had a disability under the ADA's statutory definition. See 42 U.S.C. § 12102(2); Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994). Therefore, for substantially the same reasons as stated in the district court's oral ruling on February 27, 1997 and its subsequent written order dated March 5, 1997, we conclude that Storage Technology is entitled to summary judgment on Mr. Gagliano's employment discrimination claims.

As to the retaliation claim that proceeded to trial, Mr. Gagliano argues that the district court improperly excluded letters and memoranda written by him to Storage Technology representatives during the course of his internal appeal. He challenges the district court's ruling that these proffered exhibits were not contemporaneous, were hearsay, and were potentially misleading because they contained references to the previously dismissed employment discrimination claims. Mr. Gagliano also contends that although the district court subsequently admitted redacted versions of two of these

exhibits, it improperly excluded two other redacted exhibits as not contemporaneous hearsay exception, Fed. R. Evid. 803(24), as contemporaneous writings, or under the business records hearsay exception, Fed. R. Evid. 803(6).

We review a district court's decision to exclude evidence for an abuse of discretion. See Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995). Here, the original exhibits contained numerous hearsay statements and references to the dismissed discrimination claims. Further, the district court correctly observed that Mr. Gagliano was capable of testifying to the same material. Accordingly, the district court did not abuse its discretion in excluding the original exhibits. Additionally, the two redacted exhibits excluded by the district court were not contemporaneous to the retaliation events, did not bear the necessary hallmarks of reliability under Rule 803 (24), and ere not business records in any sense of the term. Thus, after careful review of the record, we conclude that the district court did not abuse its discretion in excluding the redacted exhibits.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of the defendant Storage Technology Corporation on all three of Mr. Gagliano's employment discrimination claims. We also AFFIRM the district court's judgment in favor of Storage Technology Corporation on Mr. Gagliano's retaliation claim.

Entered for the Court,

Robert H. Henry
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed March 5, 1997]

Civil Action No. 96-WY-1793-AJ

SAMUEL DOUGLAS GAGLIANO,
Plaintiff,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware corporation,
Defendant.

ORDER GRANTING, IN PART AND DENYING, IN PART, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on February 27, 1997, for hearing on defendant's Motion for Summary Judgment. The court has considered the entire file, has heard argument of counsel and is fully advised. The court made its findings of fact and conclusions of law of record at the close of the hearing. It is therefore

ORDERED that defendant's Motion for Summary Judgment is GRANTED in part. It is further

ORDERED that judgment be granted in favor of defendant and against plaintiff on plaintiff's claim for relief under the Age Discrimination in Employment Act; plaintiff's claim for relief alleging reverse sex discrimination under Title VII, and plaintiff's claim for relief the Americans With Disabilities Act. It is further

ORDERED that defendant's Motion for Summary Judgment on plaintiff's claim of retaliation is DENIED.

Dated this 5th day of March, 1997

/s/_____
UNITED STATES DISTRICT JUDGE
BY DESIGNATION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1793-AJ

SAMUEL DOUGLAS GAGLIANO,
Plaintiff,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware corporation,
Defendant.

TRANSCRIPT OF MOTION PROCEEDINGS

Transcript of Motion Proceedings on the above-entitled matter before the Honorable Alan B. Johnson, Judge, Denver, Colorado, commencing on the 27th day of February, 1997.

Court Reporter:

Mr. ERIC D. NORDBERG, RPR
Official Court Reporter
District of Wyoming
Room 2228, 2120 Capitol Avenue

Transcript of Motion Proceedings 2/27/97

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INDEX

Argument by Mr. Joyce	3
Argument by Mr. Baca	16
Ruling of the Court	29

PROCEEDINGS

(Motion proceedings commenced 8:29 a.m., February 27, 1997.)

THE COURT: The matter for hearing this morning is Gagliano versus Storage Technology Corporation, 96-WY-1793. This is a motion for summary judgment. Each party will have 20 minutes.

MR. JOYCE: May it please the Court. Good morning, Your Honor.

THE COURT: Good morning.

MR. JOYCE: I am Craig Joyce, counsel for StorageTek, and seated at counsel table also is Mr. Dwight Seeley, senior litigation counsel in-house with StorageTek.

THE COURT: Good morning, Mr. Seeley.

MR. SEELEY: Good morning, Your Honor.

MR. JOYCE: Your Honor, before I launch into the argument portion of my presentation, I need to correct one statement that is made in our brief that is in error. It is in the statement of facts, particularly paragraphs 8, 9 and 10, just simply contain what to me is a somewhat unexplained error as to the system that was used for evaluation of the various candidates for selection for the RIF. We stated in the brief erroneously, as it turns out, that a system was used which took the prior two years' numerical rating on the performance evaluation, blended them to come up with a composite number, then those numbers were ranked.

That, in fact, is the system used most often. It is still used today, but it not the system used in the reduction in force that the plaintiff lost his job in. In fact, the system used then

was there were no numerical grades used, there was a paired comparison, sometimes called a forced ranking.

And by the way, the plaintiff points this out in their response brief, and correctly so. That is the system that was used. We don't believe that this factual misstatement on our part changes the legal analysis at all.

Plaintiff has brought this employment case and brought four different claims for relief. Plaintiff claims he was discriminated against on account of his age. He claims he was retaliated against. He claims he's a victim of reverse discrimination, and he claims he has lost his job because he was disabled. I will take the four points with the time I have addressing them in the order that are presented in the briefs.

First, the age claim. I would like to point out, first of all, that this case appears to have been spawned out of a sense that there was an adverse impact based on age in the particular reduction in force at issue in this case.

I point that out because the record is replete with statements made by the plaintiff early on that when you look at the seven persons who were in the pool out of whom two were ultimately selected for reduction in force, the two who ultimately lost their jobs, plaintiff and one other, were both males over the age of 40. And there are numerous statements like this in the record.

We can dispose, I believe, with the adverse impact case based on age rather quickly. The Tenth Circuit has held in a case approximately one year ago, Ellis versus United Airlines, that there simply is no cognizable cause of action for

adverse impact on age theory. That leaves the disparate treatment theory; that is, plaintiff must show an intentional decision where the employer took the factor of age and intentionally took some adverse action against the plaintiff based on that.

I just mentioned a minute ago that the record is replete with examples of where the plaintiff himself has used words and made statements to the effect of the employer, StorageTek, failed to consider his age in the process of this reduction in force. Those statements are set forth in the exhibits to the motion for summary judgment. I would just highlight three of them for the Court.

Our Exhibit 7, page 2, there is the statement, this is a statement made by the plaintiff in one of the appeals internally in the company after he was laid off that Tonda Franklin was not aware I was over 40. Tonda Franklin was in the management chain that made the decision on selecting the persons who would be let go in this reduction.

At our Exhibit 3 to our motion on a page which is numbered with a Bates stamp number 138, again, statement by the plaintiff, StorageTek used formulas with no consideration of age. This statement, like others, is frequently accompanied by statements to the effect of, well, the company failed to consider my seniority, which it did, in fact, did not consider seniority.

Also in Exhibit 3, two pages later on a page number Bates stamped 140, again, I quote from the plaintiff, "They did not realize I was over 40."

Now, in the response to our motion for summary judgment, plaintiff does not deny making these statements, in fact, admits them. The plaintiff's response contains a statement to the effect that the plaintiff does not dispute that he made these representations; however, the plaintiff should not be held to a standard of understanding the nature of any legal claims he may have in this action.

Well, I submit that whether the plaintiff understands the legal significance of comments he's made is for the purposes of today's discussions irrelevant and for the purposes of this lawsuit is irrelevant. Statements were made, it is, in fact, the evidence, that the plaintiff is putting forth on his age case, and he certainly must abide by the law, as we all must, and the significance of the statements, whether he understands them or not, must be brought to bear.

Now, interestingly, there are no allegations that any specific age-related comments were ever made to the plaintiff. Again, this is stated in the plaintiff's brief as well as in the affidavit which the plaintiff himself prepared and signed attached to the plaintiff's response to our motion for summary judgment.

There is a statement Mr. Hartsfield -- and Mr. Hartsfield was the plaintiff's immediate direct supervisor and a person with whom we can all agree he did not get along, but the statement is contained in the plaintiff's papers that Mr. Hartsfield never made any age-related comments which could be construed as indicia of discriminatory animus. That's a quote, Your Honor, that I've taken from the plaintiff's responsive brief, never made any age-related comments that could be construed as indicia of discriminatory animus.

There are no allegations in the complaint, nor elsewhere, nor has the plaintiff come forward with any evidence that any other person in the employment situation at StorageTek ever made any age-related comments.

I would submit, then, that what is left for a jury to determine, there's a complete absence of evidence of any comments, statements, any evidence of age bias, any evidence that age was taken into consideration. In fact, the evidence is clearly that -- the evidence put forth by the plaintiff is clearly that the company did not consider his age, failed to consider his age, and had it considered his age, they would have realized he was some 43 or 44 years old at the time of the employment decision, and under his view, if they had considered his age, they wouldn't have selected him to lose his employment in the reduction in force.

I'll turn next to the reverse discrimination case.

First of all, in a reverse discrimination case where the plaintiff is not a member of an historically disadvantaged class or a suspect class, in this case we have a white male, mid-40-year-old male, there is not any inference that discrimination has occurred. In fact, there is an additional element which must be proven in a reverse discrimination case. This element is set forth in the case of Livingston versus Roadway Express, a Tenth Circuit opinion from 1986. It's cited in our brief. And quite simply, that additional element is this: That the plaintiff must come forward with a showing of background circumstances about which the employer -- to demonstrate that this employer is that unusual employer who discriminates against the majority.

That is an actual element of a reverse discrimination claim. The complaint contains no such allegations. The record developed in the case so far contains no such allegations.

Looking at the plaintiff's responsive papers to our motion for summary judgment, the point is simply not addressed. The case is not discussed. There is no information contained in the responsive papers themselves, nor in the affidavit of the plaintiff supporting the responsive papers which in any way goes toward that additional element of, quote, background circumstances, and I'm using those words because that is the word -- those are the words that the Livingston versus Roadway Express case takes -- uses, I'm sorry.

There is just simply no showing at all of these special circumstances or unique circumstances about this employer that would in any way enable a finder of fact to conclude that this is that unusual employer who discriminates against the majority.

I would next turn my attention to the retaliation claim. As the Court is well aware, there are three elements in a retaliation claim. Simply stated, number 1, that the plaintiff engaged in some protected activity; number 2, that there was an adverse employment action taken after that protected activity was engaged in. The third element is that there be a causal connection or a nexus between the protected activity and the adverse action.

In this case the record is quite clear that the order of the first two elements is reversed, they're backward, and that is fatal to the retaliation claim. Because in this case, we have

the adverse action being taken first, the adverse action being Mr. Gagliano being informed on January 21, 1993 that he had been selected for losing his job in a reduction in force. The second event in this chain, which, were it proper, would be the first, but in this case was the second, is the protected activity.

Now, in this case the protected activity is making a claim or a statement or a threat, call it what you will, that the plaintiff is going to file a charge with the EEOC.

We'll take it for purposes of argument that that in itself, that statement, is a protected activity. It came after he was informed that his job had been eliminated. So they're just plain reversed, and there cannot be retaliation under the circumstances.

Now, the retaliation claim has changed a little bit, perhaps evolved is the word, that now in addition to, well, the company didn't change its mind and decide to take me off that reduction in force list, which was sort of where it was initially, but now it is, okay, well, then there were other jobs that opened up in the company and I should have gotten one of those jobs, and I was prevented from getting one of those jobs because I had made the statement that I was going to file an EEOC charge.

That version of retaliation must also fail for the simple factual reason, and this is undisputed factually, that the plaintiff never applied for any of those other jobs. And again, if you look at paragraph 26 in the plaintiff's affidavit, that is, the plaintiff's affidavit that was submitted with the responsive papers to the motion for summary judgment, plaintiff admits

he did not ever apply for any of the two positions that he now states he should have gotten.

I don't know how the company can discriminate or take an adverse action against a person by not giving them a job which they never applied for. And certainly the plaintiff, who for the eight or so years he worked for StorageTek, the plaintiff himself was a human resources representative. He, of all people, would know that if you want a job in the company, you've got to apply for it. Having never applied for it, the company would not be in a position to discriminate against him by refusing to give to him or retaliate against him.

The last claim I will address is the disability claim. There are three basic elements any plaintiff must show to prevail in a disability claim. First, the plaintiff must show that he is disabled within the meaning of the Americans With Disabilities Act, which, as the Court knows, is a specialized definition. It might be different from the common meaning of disability that most of us who didn't practice under the ADA might have.

The second element, that is, he is qualified, that is, with or without an accommodation, he is able to perform the essential functions of the job.

And the third element the plaintiff must show he was terminated because of his disability. Again, that's the causal connection.

The evidence developed in the record to date and that's put forth by the plaintiff in response to our motion for summary judgment shows that the plaintiff is deficient in all

three elements.

As to disability, plaintiff's claim of disability, which, by the way, was not diagnosed at any time prior to his leaving the company, is that he suffered from post-traumatic stress disorder stemming from some unfortunate and abusive incidents in his childhood in a relationship with his father that he has carried into adulthood and working with one particular manager, Mr. Hartsfield -- I referred to him earlier -- and again, there is no dispute this plaintiff had some conflict with his manager, Mr. Hartsfield. This condition, this post-traumatic stress syndrome or disorder, was triggered by interactions with Mr. Hartsfield. There are allegations of some flashbacks to earlier situations triggered by some parallelism in the relationship.

That seems to be the extent of the disability as put forth by the plaintiff. There's no suggestion that the plaintiff could not work with any other manager; no suggestion that the plaintiff is in any way prevented from engaging in a broad class of jobs; no suggestion by the plaintiff that there are 50 percent of the managers in this company for whom I cannot work because of my unique disability. This is down to one person. It is I cannot work for Mr. Hartsfield because he reminds me or he triggers up memories of things I'd sooner forget and it brings flashbacks, it's a unique disability, unique to me and unique to this manager.

Well, under the law, that is not a disability. That does not fall within the definition of disability under the Americans With Disabilities Act. One person being disabled from performing one job at one employer, it simply does not meet the definition of disability.

The second element, that is, can perform the essential functions of the job with or without a -- excuse me, with or without an accommodation. I'd like to focus on accommodation, because the plaintiff has only put forth two situations which could conceivably be construed as asking for an accommodation. In fact, we believe the record shows he never asked for such an accommodation. But taking the facts in the light most favorable to the plaintiff, there was one meeting in approximately December 1992. It was approximately one month before the plaintiff or anyone, for that matter, knew that he would be laid off in this reduction in force, he claims to have had a meeting with his own human resources representative, Mike O'Neal, where he requested a transfer. He did not like working for Mr. Hartsfield and he requested a transfer app.

Now, the plaintiff describes this himself in paragraph 1 of his own affidavit. And I would commend reading that particular paragraph to the Court's attention because there is absolutely nothing in the plaintiff's own description, certainly not in Mr. O'Neal's description of that meeting, but not even in the plaintiff's own description where he suggests, number 1, that he conveyed any information to Mr. O'Neal that he had a disability, or that, number 2, he wanted any -- that his request for a transfer was any kind of an accommodation for a disability. It was simply, I'd like to stop working for Mr. Hartsfield. Please see if you can assist me getting a transfer.

Then the second factual scenario which the plaintiff advances now as the request for an accommodation occurred after he was informed that he was selected to lose his job in this reduction in force and that is he claimed he asked for a medical leave of absence and it was denied by the company.

Well, a medical leave of absence by definition is a statement by a doctor or some type of medical professional which says you can't work; you've got to leave the workplace; you've got some condition which renders you either temporarily, permanently, whatever, renders you incapable of working.

That gets to the element of able to perform the essential functions of the job. If the accommodation you need to do your job is to be sent home because you can't do your job, then by definition, you are not a qualified individual. You cannot perform the essential functions of your job.

The third element in an ADA case is the causal connection; that is, plaintiff must show, must demonstrate that he was terminated because of his disability.

Now, here the record is totally devoid of any allegations. It is totally devoid of any evidence. The plaintiff himself has not said he was terminated because of his disability. He did not say it in the complaint, he did not say it in any of the evidence, any of the record evidence developed to date, and he did not say it in any of the papers presented in response to the motion for summary judgment.

So the plaintiff has simply not demonstrated the existence of a material fact in issue. By making an allegation by even his own words probably would have sufficed to create a factual issue, but there simply is none. There is no statement, no factual allegation, no evidence offered in response to the motion for summary judgment to suggest that the plaintiff makes the claim that he was terminated because of his disability.

THE CLERK: Mr. Seeley, you're now at 28 minutes.

MR. JOYCE: I am Mr. Joyce and I'm done.

THE CLERK: I'm sorry.

THE COURT: Thank you.

Mr. Baca.

MR. BACA: Good morning, Your Honor.

THE COURT: Good morning.

MR. BACA: Present with me this morning is Mr. Gagliano. I just thought I would inform the Court.

Your Honor, I'll take the defendant's arguments in the same order that was presented in the brief as well as the oral argument by Mr. Joyce.

First of all, with regard to the disparate impact argument, the plaintiff would concede that the Ellis case does control disparate impact claims attempted to be brought under the ADA. We would concede that point. At page 12 of plaintiff's brief, he indicates that -- or he alleged in his complaint that he and another employee over 40 were laid off; that plaintiff is not attempting here to assert any pattern and practice case or anything like that.

He alleged that at paragraph 14 of his complaint that younger females were retained and a third female who was -- had less time with the company, in fact, was a secretary was

groomed for the position Which he -- or at least a portion of the position which he previously performed prior to the layoff.

The defendant argues that the plaintiff has failed to allege that he was discriminated against because of his age. And the plaintiff would suggest to the Court that liberal interpretation of the allegations which he sets forth in paragraphs 11 and 14 of his complaint lead to no other conclusion that he was, in fact, complaining about the fact it was his belief he was being discriminated against because of his age.

Now, although not addressed in the oral argument, the defendants suggest in the brief that he cannot -- that the plaintiff cannot prove that his work was satisfactory. In other words, he's clearly -- let me backtrack a second. He's clearly over 40, so he is within the protected age group under the statute.

With regard to the second element that he must prove, I believe that the documents submitted by the plaintiff clearly reflect he was, in fact, qualified for the job. He makes reference to at paragraph 19 of his -- of Exhibit A, which is his affidavit, he indicates that a scheme, the numerical scheme that StorageTek used in evaluating performance, Attachment 7 to his affidavit, he indicates that in 1989 and 1990, he received a score of 2.413, and in 1990-91, he received a score of 2.3375, which are clearly within the range of performing above average as set forth with the scheme that they used 2 being average performance and 3 being outstanding performance.

And also in Attachment 3, which is his 1991-92 performance evaluation, although it's a non-numerical system being used at that time, a careful review of that particular performance evaluation clearly reflects his performance was above average.

Now, the plaintiff has offered the so-called operating agreement, Exhibit 10 attached to his brief, and is suggesting that this particular document reflects sub-par performance by the plaintiff, and the plaintiff asserts in paragraph 19 that the Exhibit 10 was merely an understanding, a memorandum of understanding of how he and Mr. Hartsfield would interact in the future and what their roles with respect to one another would be.

Furthermore, Your Honor, Exhibit B of plaintiff's response, which is the deposition of Mike O'Neal, one of the managers involved in this case, he indicates, quote, a performance improvement plan would be -- titled Performance Improvement Plan would have specific goals and definite timetables within which to improve performance, and when you look at the operating agreement, there's nothing contained in that document which reflects that this was somehow intended to be a corrective action, plan or performance improvement plan.

And at paragraph 19 of his affidavit, the plaintiff indicates that he was never ever disciplined in any manner or ever placed on any sort of performance improvement plan.

Now, with regard to the issue of direct evidence, it is correct that the plaintiff has represented accurately to the Court that Mr. Hartsfield never used, never made comments

which could be construed to be what I will call derogatory comments; that he didn't make reference to, specific reference to Mr. Gagliano's age or never said, "We needed new blood in the company," or anything like that, but in his affidavit, Mr. Gagliano represents to the Court at paragraph 22 that he had frequent interaction with Mr. Hartsfield and that throughout this entire relationship between the two that Mr. Hartsfield was constantly indicating to him that he was inflexible -- he'd been with the company a long time -- constantly using the term "inflexible" which we would argue to the Court that that -- those sorts of comments are reflective of some age animus on the part of Mr. Hartsfield.

The plaintiff has further represented in that same paragraph 22 of his affidavit that every session he had with Mr. Hartsfield where these comments were made to him clearly left him with the impression that he was an older worker who was not flexible and not adaptable to change or not willing to adapt to change.

And Exhibit A, Attachment 4, indicates that the only other persons in his -- in Mr. Hartsfield's group were Jean Epstein and Debbie Coyle, who was the secretary that I made reference to, and these ladies were clearly younger than Mr. Gagliano.

Now, the defendants this morning -- or the defendant this morning comes before you and tells you, hey, we made a mistake on our papers. Well, I would submit to you that on the one hand, they were telling the Court in their papers that we used this numerical system. In fact, the plaintiff had complained early on in this whole controversy that the system was not being used and that there was no way under that

system he would have been eliminated from his job.

Now, they come before you this morning and say, we made a big mistake and we can't explain it. Now, we're using the system that was really used was the comparison or forced ranking method. And I would submit to the Court the defendant is speaking out of both sides of their mouth, that that goes to the issue of whether or not that proffered information that the business reason was non-discriminatory or legitimate clearly makes it incredible when they're saying two different things.

And I would submit that a jury should be allowed to hear on the one hand that they said they used the numerical system and did a particular scoring and Mr. Gagliano ranked lowest and then recant and say they used a different method, that clearly goes to the issue of credibility, and when credibility is demonstrated with regard to the offered legitimate, so-called legitimate business reason, that clearly does not require the plaintiff offer any evidence of pretext if that explanation is incredible.

With regard to the reverse discrimination claim, Your Honor, the plaintiff would simply submit that he had more experience as shown in Defendant's Exhibit 4 than Miss Epstein. And as I indicated earlier, Miss Coyle was the secretary who took over a good portion of Mr. Gagliano's duties and she, in fact, was also younger than Mr. Gagliano.

Addressing the third claim, the retaliation claim, Your Honor, paragraph 16 of the plaintiff asserts he was informed that he would not be retained, the words that are used in the complaint, because of his threat to file with the EEOC. The

defendant argues first that he never -- in the brief I believe that he never indicated that fact in his charge to EEOC.

The way this whole situation happened, Your Honor, he was informed on January the 21, 1993 that he was going to be laid off. He was basically marched out the door that day. He later scheduled an appointment with Tonda Franklin, who was the Equal Employment Opportunity manager, shortly thereafter after being informed.

In between those two points in time, he learned through an anonymous mailing that was sent to him that there were, in fact, two other positions that were opening up within the same organization, that being the organization administered by Tavia Campbell. When he learned of those positions, he brought that to the attention of Tavia Campbell -- pardon me, to Tonda Franklin, expressed his interest in those two positions and then Miss Franklin asked him to get back in touch with her once he returned from a short trip to Florida which he had planned.

Upon his return, he's advised, well, you can't be considered for those two positions because you told Tonda Franklin that you were going to file a charge with the EEOC.

Defendant's arguments of -- argument of the cart being before the horse may be true with regard to the actual position from which he was eliminated, but it is clearly within the prima facie case of retaliation as with regard to the two organizational development positions.

Now, throughout his attempts to appeal internally his termination, he first went to a vice president by the name of

Sewell "Bud" Sleek and talked about those two positions, why he's not being considered for those. He used this open door appeal procedure to the chief executive officer of StorageTek, Mr. Ryal Poppa, again indicating his interest in those two positions. So he clearly throughout this entire ordeal expressed, was making complaints about, hey, why am I not being considered for these two positions?

Now, it is accurate that in the charge filed with the Equal Employment Opportunity Commission that there's no reference made to those two particular positions, but in his affidavit, the plaintiff represents that he did, in fact, discuss those two positions with the intake person at EEOC, and I would submit that under the Sanchez versus Standard Brands case that this -- the circumstances about these two positions are clearly reasonably related to the original charge that he filed it.

Had the EEOC, for example, done an investigation, it's reasonable to conclude they would have looked into those matters and we would suggest to the Court would or should apply a reasonableness test as to whether or not that circumstance of those two positions was reasonably related to what he was complaining about. Unfortunately, the charge prepared by the EEOC is very skimpy and doesn't really say a whole lot.

Further, Your Honor, the plaintiff has submitted that StorageTek also had a policy of priority of employment, if you will, for filling certain jobs, and that's contained in Attachment 5 to plaintiff's affidavit, and a preference is given to those particular persons whose positions have been declared excess.

You know, the plaintiff submits that he was entitled to a -- some consideration for those two particular positions because he was, in fact, qualified. In his affidavit, he indicates he had prior experience with StorageTek in Florida as well as his previous employer in the area of organizational development. Now, the defendant just ignored its own policies and we would submit that that is also indicia of retaliation.

Now, with regard to the retaliation claim, the next thing that the defendants argue is that, well, he never actually applied.

Well, Your Honor, the circumstances of this case is that he was marched out the door, his badge and his keys were taken from him. I would -- and then he was told by Tonda Franklin, Tavia Campbell says because you threatened to file a charge with EEOC, you're not going to be considered for these two positions. Requiring the plaintiff to make formal application would be a useless act. That would have been an exercise in futility. In fact, in his affidavit the plaintiff says such.

So we would submit to the Court that the plaintiff has established a prima facie case of retaliation, and further, because the company ignored its own policies with regard to the employment priority, that is evidence of pretext that any explanation they would offer is without merit.

With regard to the disability claim, the plaintiff is clearly an individual who is suffering from some mental problems of dysthymia, which is a condition where a person is frequently despondent, and that he was suffering from post-traumatic stress syndrome.

It is correct that the actual specific diagnosis of post-traumatic stress syndrome was made after he was terminated, but the fact remains that the plaintiff was in mental health therapy for a period of almost -- all of 1992 and the first few months of '93, continuing on into approximately I believe it was either May or June of 1993. And as part of his therapy, as he's indicated in his affidavit, the plaintiff is encouraged by his mental health care providers to share the fact that he was suffering from this, these problems. And he did, in fact, tell just about everybody at his job site that he was in mental health therapy. He didn't say to these folks -- the defendant argues, well, he just told them about symptoms. He wasn't talking about symptoms to them. He was telling them, hey, I'm in therapy.

At paragraph 28, he indicates that he told his supervisor, Mr. Hartsfield, the other managers, including Mr. O'Neal, who counsel has made reference to in his oral argument. During this meeting in December of 1992, during the Christmas shutdown, Mr. Gagliano informed Mr. O'Neal of his problems, did ask for a transfer and this request for transfer was just absolutely ignored, nothing was done about it, and subsequently, the plaintiff did request another form of reasonable accommodation, that being a medical leave. And, you know, the facts are such, Your Honor, that it is true that he made this request after he was informed of his layoff, but it was prior to his actual termination.

Now, finally, the defendant argues that plaintiff cannot show plaintiff was terminated because of his disability.

Well, Your Honor, I would submit the facts that, number 1, he was marched out the door with very little

consideration. In fact, Mr. Hartsfield initially requested when he informed him, I want your badge and your keys, and basically is telling him to -- you're out of here right now, he did spare Mr. Gagliano the embarrassment of being marched off the premises in front of his co-workers and did wait until the end of the day when the other employees had left, but he did, in fact, want that badge, wanted those keys and wanted him out of there that day.

I think an inference can be drawn from that that at least Mr. Hartsfield was concerned about the mental stability of Mr. Gagliano, requiring such an abrupt departure and no less escorted by another employee.

Further, Your Honor, the plaintiff on the morning that he was informed of his termination, or layoff, has a meeting scheduled with Miss Campbell at which time he wanted to once again express to her the problems that he was having with Mr. Hartsfield and once again to request that if something could be done in the form of a transfer.

Basically Miss Campbell played some mind games with him. She called before he was informed, told him, I can't meet with you today. Let's schedule it for another day. She clearly knew at that point. I mean, Mr. Hartsfield was in the process of or about to inform Mr. Gagliano that he was to be terminated. So she schedules this appointment with him at a time when she knows he's going to be told, you're out of here. I mean, you're laid off. Turn in your badge and keys. You're out of here.

So I would suggest that there is an inference can be drawn from that that she was also concerned about his mental

stability. He was not allowed to work one day on the premises after January 21, 1993. They took his badge and his keys and he was gone. His actual termination was not effective until February -- it's either the 3rd or the 5th, Your Honor. I apologize. I don't have that date off the top of my head. It was approximately two weeks after he was informed.

I would submit to the Court that that also -- an inference can be drawn from that that they were concerned about his mental stability and perhaps believing that he might fly off the handle or something as a result of everything that was happening.

I would submit that the plaintiff has established what is necessary to overcome the defendant's motion for summary judgment and I would ask the Court to deny the same. Thank you.

THE COURT: Thank you, counsel.

This case arises from a termination or layoff that occurred on January 21, 1993 when the plaintiff, who was a 48-year-old-white male, employed by Storage Technology Corporation, was notified by it he was being laid off as part of a reduction in force, or RIF, in reorganization that was going on within that organization.

He brings claims of reverse sex discrimination under Title VII of age discrimination under the ADEA and disability discrimination under the Americans With Disabilities Act. He also brings a claim of retaliation and contends that the company refused to consider him for any vacant positions -- a retaliation claim is also a Title VII type of claim -- because

it learned he was threatening to file a claim of discrimination with the EEOC.

Defendant has come before this Court and argued and briefed and plaintiff has opposed and argued and briefed the defendant's motion for summary judgment as to all claims.

At the time of his discharge, the plaintiff was 45 years old and was working within a human resources area of the organization.

Storage Technology employs more than 20 persons. It is an employer within the meaning of ADA, Title VII and ADEA. He was employed from April 1, 1985 to the effective date of his separation on February 5, 1993. Although the effective date of his discharge was in February, the last day he was physically present or on the job was the day he was notified he was being discharged on January 21, 1993. On that day, he was required to turn in his badge and key, in other words, his access to the -- to Storage Technolocy as an employee.

The indicia of his employment. Plaintiff held the position of senior human resources representative the entire time he worked for Storage Technolocy. He exhausted all internal company appeal procedures to contest his layoff without relief and filed his charge on discrimination on June 23, 1993 alleging discrimination because of age, sex, disability and in retaliation for advising officials that he was to file -- planning to file his charge with the Equal Employment Opportunity Commission.

Counsel, I'm sure, are well aware of the standards for

granting summary judgment. How far, the purpose, harkening back to older cases, is to separate what is real, what can be proven in a case versus what is not real and to determine whether or not a trial is necessary and that the expense and obvious dislocation that is caused to all parties in gearing up and expending resources to prepare for a contested proceedings in a trial court should go forward or should not be expended.

That is done by looking at whether or not there are genuine issues of material fact for trial as was raised here by Mr. Joyce in his argument, requiring that there be more than a mere scintilla of evidence to avoid summary judgment from which a reasonable jury could return a verdict for the non-moving party.

Summary judgment may be granted if the evidence is merely colorable or is not significantly probative and that is from Vitus, V-I-T-U-S, versus Beatrice Company, 11 Federal 3d 1535, Tenth Circuit, 1993.

Turning then to the various claims that have been asserted by the parties in this case. The first one that I will talk to you about will be the retaliation claim. To establish a prima facie case of retaliation in violation of Title VII or the ADEA, plaintiff must show that he engaged in protected activity, complains to the EEOC and that he suffered an adverse employment action subsequent to the protected activity.

Plaintiff has conceded that at least one theory under which this has been brought fails in that the timing does not match up with the subsequent adverse employment action to

the protected activity; however, does not concede the central theme that he was denied rights that existed by virtue of company policy as well as rights that he may have expressed, maybe not by formal application, but by expressed intention to Ms. Franklin and to others within the organization seeking employment and was denied because he was denied access to that process because he had expressed his intent to seek relief through EEOC. And finally, there must be a causal connection between the protected activity and the adverse action.

Those elements are found in Cole versus Ruidosa Municipal Schools 42 Federal Reporter 3d 1383 from the Tenth Circuit.

This is an unusual case, and there is really nothing to contest plaintiff's statement contained in his affidavit that Miss Franklin later told him after he had had his conversation referred to by Mr. Baca that she came back and said that he would not be considered, would not receive consideration for the open positions because he had threatened to file a charge of discrimination with the EEOC.

It is clear that refusal to rehire can be an adverse employment decision upon which a retaliation claim may be brought. He seeks to exclude the retaliation claim here -- defendant seeks to exclude it because plaintiff did not include a claim for retaliation specifically based upon failure to rehire.

Administrative charges of discrimination need not be pleaded with great particularity. That's Johnson versus Cadillac Plastics Group, 908 Fed Supp. 847, 850, District of

Colorado, 1995. However, a civil claim must be reasonably related to the administrative charge to withstand a motion to dismiss. Did the defendant have sufficient notice from the administrative charge of the allegations and areas of discrimination of whether the administrative agencies and employers involved had an opportunity to work on the conciliation agreement for voluntary compliance in the challenged areas?

In this case plaintiff made it clear to the company in his correspondence regarding his discharge and his correspondence with EEOC during its investigation that he was claiming that the company refused to consider him for open positions on the express grounds that he had threatened EEOC complaint.

The Court finds that there are material issues of -- or genuine issues of materia! fact that preclude the granting of the motion for summary judgment with regard to the retaliation claim that's been filed by the plaintiff in this case and would deny the same at this point.

Turning, then, to the ADEA claim. The plaintiff contends that he was laid off because he was over the age of 40, 45 years specifically, when he was terminated. In a reduction in force case, the plaintiff must show that, first, he's a member of the protected age group, which in this case is an admitted fact; second, that he was doing satisfactory work, and which is not admitted; third, that he was discharged; and, fourth, that the employer discriminated in reaching the decision at issue; discriminating, such that age was a motivating factor in the decision to lay the plaintiff off, citing Price versus Public Service Company, 850 Fed Supp.

934 at 949, the District of Colorado. That case was reversed on other grounds apparently.

This case differs we say apparently because -- we didn't -- weren't able to get ahold of that opinion. This case differs from most reduction in force cases because plaintiff claims that younger persons were retained and took over his job. Employees he challenges who were replacing him were 42 and 40.

And I would note that is a negligible difference, and there is case law out there from the District of Florida, for one, that would indicate that the greater that that age differential is, a plaintiff 57 replacing a person 40 is more significant and cognizable in the eyes of the law.

Plaintiff challenges the way the company discharged him has created a disparate impact and that disparate impact has been conceded here today in the oral arguments. Recognizing Ellis at 73 Federal Reports 3d 999 at 1007 held that disparate impact claims are not cognizable.

Plaintiff contends that it was StorageTek's failure to weigh age or seniority as a factor in a decision for reduction in force that resulted in discrimination against age.

That is made clear in a number of places referred to by Mr. Joyce, Exhibit 7 at page 2, Exhibit 3 at page 138, again at page 140.

Defendant has submitted materials that show that those who made the decision were, by plaintiff's own admission, unaware that he was over 40. It is plaintiff's theory he was

targeted because those making the decision were unaware that he was in the protected class, in other words, ignorant, had not studied the issue and, therefore, they can easily get rid of him. As defendant points out, in the absence of evidence the decision makers were aware of plaintiff's age, there can be no material issue or genuine issue of material fact on whether or not there was intentional discrimination, whether age was a motivating factor in the decision to terminate or lay off the plaintiff.

However, plaintiff also submits, in my frequent interactions with Mr. Hartsfield, he never blatantly made any derogatory age-related remarks to me. However, he, from the beginning of supervision of me, often commented to me that I was inflexible because of my lengthy experience in the field of human resources, and he also made it, in fact, clear to me he was the manager and expressed very little regard or respect for my lengthy experience. These interactions left me with the distinct impression that he considered me to be an older worker, could not adapt to change. That's at page 14.

Plaintiff's feelings or impressions as set forth in his affidavit, in the view of this Court, are insufficient to raise a genuine issue of material fact on the issue of age discrimination. The Court will grant the motion on the ADEA claim that is raised. It is -- requires quite a leap, in the view of this Court, to equate the personality characteristics expressed, assuming that that is correct, that's what happened of inflexibility and apply a stereotype to it, which the plaintiff wants the Court to do, to suggest that that suggests age. More is required than simply a subjective feeling.

Turning, then, to the reverse discrimination The

plaintiff has a high threshold that he must climb over in order to proceed in this case. The presumptions that are -- that exist under a Title VII scenario when a plaintiff belongs to a group that has been historically disfavored do not necessarily and are not necessarily justified when the plaintiff is a member of an historically favored group, white male.

The case that the parties cite here is Livingston versus Roadway Express, Incorporated, 802 Federal Reporter 2d 1250 at 1252, Tenth Circuit, 1986. To establish a reverse discrimination claim based on gender, plaintiff must show, in addition to the other required elements, background evidence supporting the inference that the employer is one of those unusual employers that discriminate against the majority. Alternatively, the plaintiff may establish a prima facie case by indirect evidence whose cumulative probative force, apart from the presumptions operations, will suffice under the controlling standard to support as a reasonable probability the inference that but for plaintiff's gender, he would not have been terminated. Notari versus Denver Water Department, 971 Federal Reporter 2d 585, 590, as well as other cases, Roemer, R-O-E-M-E-R, versus Public Service of Colorado, 911 Fed Supp. 464, 468, District of Colorado.

Here the plaintiff must present evidence supporting a reasonable inference that, in effect, the defendant's discrimination was the actual reason for the challenged decision.

In this case the section where plaintiff worked had seven employees, four of whom were males and two positions were eliminated. The positions that were selected were both positions occupied by a male.

Plaintiff attempts to show he was replaced by a female. That female was promoted to a human resources position from a combination position where, as a secretary, she gradually added human resources responsibilities to her tasks that had occurred. Shortly after plaintiff left, she was promoted from secretary to human resources associate where she then took over servicing three -- more than 300 of the 1300 employees who had formerly been serviced or offered human resources services by the plaintiff that was on the plaintiff's plate. That was from the Coyle deposition, page 10. Many of the other employees formerly serviced by plaintiff were serviced yet by another co-worker, a male. In addition, the company hired a female to fill the vacancy created when the former secretary was promoted to human resources associate that took over the 300 former clients or persons within the organization serviced by the plaintiff.

The picture that I have is that the secretary did not take over the plaintiff's job, but as Mr. Baca has indicated in his argument, took over a part of that job by providing services to -- human resources services to 300 employees within the Storage Technolocy organization.

These statistics of one female promoted to a lesser position than that held by the plaintiff and one female hired for a lesser position than that held by the plaintiff and the plaintiff and another male discharged when their senior positions are eliminated are not significant enough to show substantial adverse impact because they do not constitute the required impact required by law, Roemer at 469.

These statistics do not eliminate nondiscriminatory explanations for disparity by showing disparate treatment

between comparable individuals.

Further, showing that an associate in human resources took over 300 of 1300 clients from a senior human services representative does not establish that the person replaced plaintiff's eliminated position.

The Court finds that the evidence brought forward on summary judgment or that would be produced at trial in this case is insufficient to support a reverse discrimination claim and a jury determination of reverse discrimination.

The final matter is the ADA claim. We're not going to keep you in suspense. I will tell you I'm going to grant summary judgment on that claim as well, knowing at this point that it is very odd that the plaintiff comes through there is a retaliation claim, that there is a very strong statement, in our view, that supports that claim.

I find and don't agree what counsel for both sides say that the elements are that the plaintiff must establish that he's disabled. He must establish that he was qualified with or without reasonable accommodation, which must be described, and able to perform the essential functions of the job and that the employer terminated him because of his disability. Again, it's an intentional discrimination issue, and there's abundant law in this circuit and this district on that point.

In support of its contention that there are no material issues of fact on any of the elements of the plaintiff's ADA claim, the defendant submits the plaintiff's own treating group therapist, Clare Comstock, holds the opinion that he's not disabled, isn't disabled, and that's Defendant's Exhibit

Number 12.

Plaintiff's evidence does show that he's been in therapy the year before he was discharged for problems relating to childhood abuse and problems that he had with Mr. Hartsfield, his supervisor, the flashback, or whatever, that was referred to by Mr. Baca. Plaintiff contends that the problems with the supervisor triggered post-traumatic stress syndrome and dysthymia, which is a depressive sort of mental condition.

However, there is no probative evidence that establishes a material fact that he was, in fact, disabled within the meaning of ADA, other than really plaintiff's subjective claim that he was, and that he had been receiving treatment for mental health issues during the past year.

The ADA defines disability. Here versus whatever view the plaintiff may have personally of his condition, the law has its own definitions which must be applied to the facts. The ADA defines disability as a physical or mental impairment that substantially limits one or more of an individual's major life activities. Everyone knows the statutory cite to that. Plaintiff contends that his problems substantially limit him in the major life activity of working. However, in order to substantially limit the major life activity of working, he must demonstrate that he was unable to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. Bolton versus Scrivner, 36 Federal Reporter 3d 939, 942, citing the Code of Federal Regulations.

At best the plaintiff is able to show that he has symptoms of post-traumatic stress disorder and dysthymia, but cannot show he was disabled within the meaning of the act. Although he shows he had problems with working with one supervisor, that does not establish a material fact on the issue of whether he is disabled from a broad class or range of jobs.

Although plaintiff contends that he sought a leave of absence from his job due to mental disability, he did not do so until the period between after being notified of the company's decision to discharge him and the effective date of his discharge sometime later.

In addition, Mr. Joyce has specifically raised concerns as to qualification. It seems to me that there are issues concerning qualification, but I would suggest that, as I pointed out, the request for accommodation that was made was tardy, after the decision had already been made.

There is discussion about being marched out of doors. Certainly that is not a pleasant prospect to contemplate, but I'm not here to second-guess policies of an organization, such as Storage Technology, nor the United States Post Office, for that matter, and some of the problems they've had with employees that have resulted in problems.

It is argued that, in effect, the policies with regard to termination requiring employees to turn in their badges and their access to the organization represent an acknowledgment that this particular plaintiff was -represents a -- or was, in fact, disabled through mental illness, but equally, an equal inference could be drawn that they would have a concern

about any employee's reaction to termination and to the needs of the organization to be secure during that time when termination occurs when persons are obviously stressed. Because we do know that, at least I would state that one of the most important things to all of us, next to our families, is our job by which we identify ourselves, and job termination is not a pleasant prospect and is one that obviously is filled with emotional turmoil.

As you can see, the ruling of this Court leaves this case on the docket with one claim. You could hardly guess that would be the one that would remain in this case and that is the retaliation claim.

Anything further about the case that we need to know today?

MR. SEELEY: Your Honor, if I may.

THE COURT: Certainly, Mr. Seeley.

MR. SEELEY: Given the Court's ruling, and I know the Court is harried, to say the least, not only covering its own docket in Wyoming but half of Colorado's, we were originally scheduled in this matter for trial March 24th. The matter was moved to March 17th. I presume that might have something to do with that small trial they've got next door. There are ten other matters set for that date.

THE COURT: Only ten?

MR. SEELEY: Only ten. So this is obviously a lean day for you, practically a holiday.

THE COURT: Yes.

MR. SEELEY: Is there any way that we might determine by the docket numbers or any other mechanism how or if it will go forward on that day?

The reason I ask -- and again, you must hear this all the time -- is that four out of the five "will call" witnesses that the company has in the case, which is narrowed considerably now, are from out of state, will have to come in by air for this. Two of the company's witnesses who are still employed are going to be presented by videotape. So that matter is taken care of. But four out of the five witnesses we do anticipate putting on are coming in from out of state, and consequently, in as much certainty as we can acquire, we would like to. I realize it's a difficulty for the Court, but is there any way that we might be able to judge that?

THE COURT: I couldn't give you a prediction at this moment. I rely very heavily upon Glenna Drake, who is with the Clerk's Office here in this district, to assist me and to arrange my schedules for me and to monitor the progress of the cases and settlements and what goes and what doesn't go. I would refer you to her as the date approaches a little more for information to where you may be sitting on that docket.

Usually about a week before trial, she and I have a conference by long distance telephone call and she tells me what's left, and I try to sign an order at that point usually based on what's old or what -- we try to get rid of the oldest cases, and I know there are older cases than this one.

MR. SEELEY: There are indeed. I think every single one of them.

THE COURT: I think you can take that as a prediction unless we have good luck, extremely good luck in settlements.

MR. SEELEY: All right. I will canvas the other attorneys to see what their dispositions are on settling.

THE COURT: She is the most knowledgeable person about what is going on on those cases.

MR. SEELEY: Thank you, Your Honor.

THE COURT: Mr. Seeley.

Mr. Baca, how are you? I haven't seen you since your last case before the Court.

MR. BACA: Yes, Your Honor, I will give the Court some good news. The Thornton matter settled day before yesterday.

THE COURT: Congratulations. That was a hard-fought decision. I'm glad it didn't have to go up on appeal.

MR. BACA: It was appealed, but with the assistance of the mediation component of the Tenth Circuit, we were able to settle it.

THE COURT: Excellent. Excellent. That was an interesting case. That case had a few new twists to it.

MR. BACA: Yes.

THE COURT: You fought hard.

MR. BACA: Your Honor, pending before the Court is a request that -- I appealed the magistrate's order disallowing plaintiff's witnesses who were basically mental health care providers. I did timely designate those three witnesses, but due to the fact they were treating, what I will call treating physicians, I indicated in my notice to opposing counsel that we didn't feel the requirement to provide any expert report since they were treating physicians. The three persons who treated Mr. Gagliano, namely Patrick Heister, Carol Comstock and Carol Kornreich, have not actually treated him since 1993. The defendants had -- have the plaintiff's medical records, and I would ask that the Court reverse the magistrate's decision and allow us to call those three witnesses.

The three persons identified did, in fact, treat Mr. Gagliano for the problems, emotional problems, that he was going through after he was told he would not be considered for those two organizational development positions, and we would attempt to limit any testimony from them to that particular issue.

Also, Your Honor, I requested in my appeal from the magistrate's order some limited discovery with regard to the two individuals who are identified in the deposition taken, I believe, on January 22nd of this year, the two individuals who filled those two organizational development positions. They were apparently filled sometime after February of 1993. Their identities were disclosed during the course of the deposition of Miss Coyle, and I would ask the Court to allow the plaintiff to have some limited discovery on at least their qualifications and their salaries.

THE COURT: Let me ask this: Is there any need to proceed on the medical end of this given the Court's ruling on ADA, or do you feel it may be important in terms of damages for the retaliation?

MR. BACA: Yes, Your Honor. Obviously these three individuals treated him prior to the announcement that he was going to be -- or the notification he was going to be laid off, but my client has advised me they also treated him for the difficulty that he was having dealing with the fact that he was being laid off, and we would attempt to limit their testimony to that period.

THE COURT: And has an appeal from the magistrate been filed?

MR. BACA: Yes.

THE COURT: Has there been a response to that appeal?

MR. JOYCE: Yes, Your Honor, there has.

THE COURT: Okay. I'm not going to spend any time in oral argument on that. I'll review those and give you a decision.

MR. BACA: Thank you, your Honor.

THE COURT: Thank you, counsel. We'll stand in recess.

(Motion proceedings concluded 9:47 a.m.,

February 27, 1997.)

CERTIFICATE

I, ERIC D. NORDBERG, Official Court Reporter for the United States District Court for the District of Wyoming, do hereby certify that I reported by machine shorthand the proceedings contained herein on the subject Motion Proceedings on the date herein set forth, and that the foregoing 48 pages constitute a full, true and correct transcript.

Dated this 15th day of August, 1997.

/s/_____
ERIC D. NORDBERG
Official Court Reporter

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1793-AJ

SAMUEL DOUGLAS GAGLIANO,
Plaintiff,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware corporation,
Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
Volume I
May 19, 1997

Transcript of trial proceedings in the above-entitled matter before the Honorable Alan B. Johnson, Chief Judge, Denver, Colorado, commencing on the 19th of May, 1997.

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MOTION IN LIMINE PAGE

Argument - By Mr. Seeley 3, 11
Argument By Mr. Baca 9
Ruling of the Court: 12

INDEX TO WITNESSES

PLAINTIFF'S	PAGE
DOUGLAS GAGLIANO	
Direct - By Mr. Baca	17
DEFENDANT'S	
SUSAN DRYOVAGE-SHECK	
Direct - By Mr. Seeley	64
Cross - By Mr. Baca	83
Redirect - By Mr. Seeley	94

INDEX TO EXHIBITS

No.	PAGE
DEFENDANT'S	
A-5	80

PROCEEDINGS

(Trial proceedings commenced 8:35 a.m., May 19, 1997.)

THE COURT: Thank you. Good morning.

MR. SEELEY: Morning, Judge.

MR. BACA: Good morning.

THE COURT: Mr. Gilmore has the jury on its way over, so we may be able to start right on time this morning.

Pleased to see everyone. The matter for hearing is Gagliano versus Storage Technology Corporation, 96-WY-1793. The matter that is pending is the motion in limine on grounds of relevance of the original claims that were brought by Mr. Gagliano, and I'll be pleased to hear you concerning that motion.

MR. SEELEY: Good morning, Your Honor. Dwight Seeley on behalf of Storage Technology Corporation.

THE COURT: Good morning, Mr. Seeley.

MR. SEELEY: Your Honor, I think the last three documents in your file should reflect the originally filed motion in limine, a response by plaintiffs and a reply filed by defendant about ten days ago. The argument is rather simple and I'll try to make it as quickly as I can.

As you may recall, this was a matter which originally had four claims in concession. On February 27, 1997 we met here and had oral argument on those and the Court dismissed the age/reverse gender discrimination, disability discrimination, and also part of the retaliation claim, and I'm going to cite to you from what we understand to be remaining as the scope of this case so that we can define that at the outset.

Plaintiff's response to our motion in limine quantifies the case as it remains as follows: That part of the plaintiff's retaliation claim, which related to his allegation that the

defendant company refused to reverse its prior decision to terminate his employment is now no longer at issue. What is the remaining claim of plaintiff's schedule for trial on the merits is his retaliation claim based upon the company's failure to consider him for the two organizational development positions, and any other positions that were available at the time of the layoff.

So we have a time frame here, which I believe defines the scope of the claim and the time involved. The scope again is the application for or failure to hire for the two organizational development positions at the time of layoff. The layoff was January 21, 1993, and the meetings in which the retaliation allegedly occurred were in February and one telephone call in March 1993.

This impacts the documents to be produced or to be used in this case substantially. Plaintiff has -- or defendant has eliminated most of its documents and is now submitting four. Plaintiff has also cut down his documents to 14 in number and we challenge of those 4 through 9 on plaintiff's exhibit list. The reason, therefore, is as follows: The plaintiff in document -- or Exhibit Number 4, in March of 1993, again, about six weeks after his conversations with Tonda Franklin in which the retaliation allegedly arises, forwards to his executive vice president a -- a document Which is Exhibit 4 which is a 20-page single-spaced outline and argument of his entire age, gender, disability and retaliation claim, and it is less than a couple cf paragraphs on retaliation.

There are also 11 attached exhibits. There are exhibits that clearly have no continuing relevance in the case, for example, just for example, the second exhibit is an operating

agreement which the company has argued was a discriminatory measure between the plaintiff and his -- and his management. Attachment number 6 is sort of a lay definition of flashbacks which was part of plaintiff's disability claim.

Attachment number 7, and so on, is a -- attachment 7 is a copy of plaintiff's notes while meeting with another StorageTek employee, HR manager, prior to his termination. We believe that these materials are irrelevant. They are argumentative and rehash claims that have now been dismissed by this Court.

Redacting them is, for the most part, not a possibility. There are 20 pages to Exhibit 4, the one I just mentioned with 30 pages of exhibit, so we would ask as to Exhibit 4 to 9 they be eliminated on the basis of relevancy because the plaintiff here can, and I'm sure will, speak today about retaliation, about who he spoke with, about speaking with the gentleman to whom these documents are addressed and so forth, as he may well want to do; however, the documents themselves are nothing but a rehash or accumulation of the fact that he had a claim and that he brought it to those gentlemen.

Again they are untimely, as we see them, to the scope of the case as defined from the Court's February 27th order, which is the jobs that were available and any retaliation associated with not being hired into those jobs at the time of the layoff, again January 21st, and the conversations at issue being two in February and one in early March.

Likewise, as to the witnesses, plaintiff has reduced his witnesses to the plaintiff and five -- or three will calls and two may calls. The will calls are David Wee, Roger Morgan and

Leonard Ostdick and the may calls are Dan Fernandez and Susan Dryovage, now known as Susan Sheck. We have no problem with Susan Sheck. I spoke with plaintiff's counsel and we will, in fact, call her ourselves and he may also call her in direct.

But as to plaintiff's Wee, Morgan and Ostdick in the original pretrial order, their testimony was characterized as testimony that would address plaintiff's skills and abilities as a human resource representative, both -- sorry. Plaintiff's witnesses Wee, Morgan and Ostdick are all ex-StorageTek employees. At the time we were prepared to go to trial on the four claims, it was argued -- arguably possible and admissible that those gentlemen could speak to plaintiff's skills as a human resource representative.

It was arguably an issue because to the extent that the plaintiff was arguing that the StorageTek layoff, the result in his termination was pretextual, he could, and might, argue that while he was a good HR representative, he was a good employee, and these particular witnesses would corroborate that, presumably.

In the response, however, filed to our motion in limine, the nature of their testimony has now changed. It is now described as follows: Mr. Morgan, Mr. Ostdick will testify with regard to the plaintiff's competence, ability in the area of organizational development. On the one hand that is in our view an amendment to the pretrial order, which is basically end running the system because at time of filing there was no mention of any knowledge on the part of any of these witnesses as to organizational development.

Indeed, we regard those as there's no possibility that they would have them, because indeed StorageTek had no organizational development department at the time it was, in fact, hiring, as plaintiff suggests, and should have hired plaintiff, as plaintiff suggests, but in any event, it consisted of a person, so there's little likelihood that Mr. Morgan and Ostdick would have any knowledge of that subject matter.

As to David Wee, his testimony as described with the response to our motion in limine is now the plaintiff's emotional and mental state before and after the date plaintiff received notification of his layoff. Again at one time, that sort of testimony might have been a baseline for plaintiff's disability claim. Again, since there is no disability claim at this time is now irrelevant.

Second portion of Mr. Wee's testimony was that he would testify that he assisted plaintiff in his presenting his appeal to Tonda Franklin and the vice president and human resources and CE0. Mr. Wee had PC skills and was able to put together Mr. Gagliano's presentation. We don't dispute that and I don't think it has any relevance in the case.

And last, Mr. Fernandez. Mr. Fernandez was a --is a mail -- was a StorageTek HR representative at the time of the layoff in which Mr. Gagliano left the company, and his testimony is characterized as regarding the terms and conditions under which he -- under which he, Fernandez, left the employment of the defendant company and on the date in which he, Fernandez, again left the employment of the company. No issue as to what date he left the company, nc issue as to what date Mr. Gagliano left the company, there should be no relevance as to what terms and conditions were

for Mr. Fernandez.

THE COURT: Mr. Baca.

MR. BACA: May it please the Court. Your Honor, with regard to the Exhibits 4 through 9, as indicated in the response to the motion in limine, much of the material is relevant only to the claims that were previously dismissed by the Court; however, Your Honor, there is much material in those several paragraphs and most of them -- or all of the documents that relate to the retaliation claim, the suggestion or the indication by Mr. Seeley to the Court that would be unduly burdensome to redact that information, I tend to agree with that, Your Honor, and -- however, the documents were contemporaneous recording of the events and I think it would be really probative in Mr. Gagliano's whole testimony with regard to retaliation of claims.

What I would suggest for the Court is that the Court simply advise the jury that those particular allegations relating to the age, disability -- well, those two particular claims are claims to be decided by the Court, and they are the underlying basis for the retaliation. I mean, that's what triggered the whole events, so they are related and I believe will give the jury a complete picture of what occurred.

With regard to the testimony of the witnesses Morgan and Ostdick, the testimony that this trial will show, Your Honor, is that the skills and abilities used by an HR representative are very much part and parcel of the concept of organizational development.

It's my anticipation at trial that the defendants, through

certain documentation that I've seen, will no doubt take the position that he was not qualified for these two organizational development positions, and the testimony of Ostdick and Morgan clearly relayed -- they have direct knowledge of work that he had performed in years previous to the events at issue in this trial.

They're very much aware of the concept of organizational development and what a personnel man or human resources man does. And they were in a position to assess his skills -- Mr. Gagliano's skills and abilities to show that he, indeed, was qualified to be considered for the positions which he was denied the opportunity to compete for.

With regard to Mr. Wee, Your Honor, the issue of emotional distress does not relate strictly to the claim of disability discrimination, but it's also remedies that are available under Title VII and are clearly -- is clearly relevant. We plan, through plaintiff, to present much testimony with regard to his emotional distress that he's suffered as a result of action taken against him. Thank you.

THE COURT: Anything further, Mr. Seeley?

MR. SEELEY: Just a couple of remarks, Your Honor. Again, relative to the -- our objection to the documents 4 through 9, it is our belief that the Court's order of February 27th, and hence the case that we need to defend is based upon that relatively small time frame in February, March of 1993, and not, for example, as in Exhibit Number 8, a letter written to Laurie Dodd, our current vice president of HR, January 30, 1996, three years after the fact.

These documents are well after the fact and they are not contemporaneously produced, but, in fact, produced after the conversations had taken place. There are notes of this conversation, and we have introduced them on -- in the defendant's notebooks. They're by Miss Franklin, who kept contemporaneous notes at the time of the conversations and telephone calls, likewise on Wee and Morgan.

Once again, we -- we regard their testimony at the most some sort of character testimony, some sort of standoff for Mr. Gagliano to say he was an able or likable representative. I'm not arguing that, but we don't believe they have any knowledge to bring to the -- to the subject of organizational development or the retaliation that is allegedly associated with it. Thank you.

THE COURT: Thank you, Counsel.

It will be the ruling of the Court and in the context of the lawsuit, perhaps at a lunch hour or recess after work, Mr. Baca, I don't mind if it's necessary to make a further record concerning the exhibits.

I will grant the defendant's motion in limine concerning Exhibits 4 through 9, recognizing that Mr. Gagliano is capable of providing the testimony -- firsthand testimony as to these events, and the impact upon him as opposed to attempting to provide the testimony through hearsay documents that in essence that he created and submitted to the company. There appears to be no notice issue that is before us at this point that I've heard or identified in the arguments that would give special import to these documents. And, as indicated, they largely relate several

paragraphs to other claims that have been dismissed by a court.

I agree with Mr. Baca that the jury's probably going to know that there are other claims that have been asserted in this matter and the Court's going to, at some point, tell them that those claims are not for the jury's consideration in this case, that would otherwise be disposed of, and to instruct them carefully as to what issues they are to consider as exhibits.

It seems to me that the documents do have -- from their description and your attachment to the motion in limine, the documents portion of motion in limine have the capacity of misleading the jury. In effect, it's an argument that would be sent to the jury from the plaintiff in addition to Mr. Baca's skills and Mr. Gagliano's recollection to the facts of his particular case.

As to the witnesses, Ostdick, Morgan and Wee and Fernandez, the Court will overrule the motion and permit these witnesses to testify. It seems to me a sufficient showing of relevancy of these persons as -- and I recognize this is -- there is a dispute that seems as to whether or not this represents a shift in the original designation.

It seems to be the most logical shift reflecting the development of this case and the issue of this case as to whether or not Mr. Gagliano was and would be considered for position and the organization development operation of Storage Technology further to describe Mr. Wee as providing information that would be helpful to the jury to assess the damages, promote damages in this case.

And finally, Fernandez, you know, although his testimony needs to be limited in time and so we're talking about apples and apples versus oranges and apples. Seems to me as a fellow co-worker pertinent type person who was affected and was present during the organizationwide layoff activities and could have shed some light through his testimony on this matter. That will be the ruling of the Court.

Mr. Gilmore, do we know if we have a jury?

THE CLERK: We have a jury, yes, sir, they're back in the room there so give them a few minutes.

THE COURT: You have them hidden from us, right?

THE CLERK: Right.

MR. BACA: Your Honor, if I may, I haven't previously, but at this time I want to move for sequestration of the witnesses also.

THE COURT: Any objection, Counsel?

MR. SEELEY: No objection.

THE COURT: The practice down here, is it okay for experts, if any, to be present in the courtroom to hear the testimony of other experts, that sort of thing?

MR. BACA: Your Honor, we're not going to have experts.

MR. SEELEY: No, we have no experts.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1793-AJ

SAMUEL DOUGLAS GAGLIANO,
Plaintiff,

v.

STORAGE TECHNOLOGY CORPORATION, a Delaware corporation,
Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
Volume II
May 20, 1997

Transcript of trial proceedings in the above-entitled matter before the Honorable Alan B. Johnson, Chief Judge, Denver, Colorado, commencing on the 19th of May, 1997.

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Motions 103

INDEX TO WITNESSES

PLAINTIFF'S PAGE

DOUGLAS GAGLIANO

Direct (Cont.) - By Mr. Baca 112
Cross - By Mr. Joyce 161
Cross (Cont.) - By Mr. Joyce 220
Redirect - By Mr. Baca 246
Recross - By Mr. Joyce 253
Further Redirect -- By Mr. Baca 258

DAVID WEE

Direct - By Mr. Baca 260
Cross - By Mr. Joyce 277

LEONARD OSTDICK

Direct - By Mr. Baca 283
Cross - By Mr. Joyce 295

ROGER MORGAN

Direct - By Mr. Baca 298
Cross By Mr. Joyce 307
Redirect - By Mr. Baca 310

INDEX TO WITNESSES

DEFENDANT'S PAGE

TONDA FRANKLIN
Direct - By Mr. Seeley 199

Cross - By Mr. Baca 220

INDEX TO EXHIBITS

No.	PAGE
PLAINTIFF'S	
6-A	112
9-A	112
10	154
14	156

PROCEEDINGS

(Trial proceedings commenced 9:20 a.m., May 20, 1997.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Counsel, let me advise you what is happening. The reason we're delayed, juror -Miss Castner, Juror Number 2, has had baby-sitting problems, is having to deliver children and is on her way.

Mr. Gilmore's going to be excused. Another one of our jurors was apparently rollerblading down here and fell this morning and is all cut up and bleeding, so we're going to take her over to the dispensary, hopefully we'll get started. Event-filled morning.

We have -- we're revisiting some evidentiary rulings and we'll use the half hour.

Mr. Baca, I'll hear you.

MR. BACA: Well, Your Honor, during the evening recess, my client and I made an attempt to redact all the materials of Exhibits 4, 6, 7, 8 and 9 to which the defendant objected. And we've tried to leave in these exhibits only introductory paragraphs and those paragraphs related to the issue of retaliation, and at this time I will offer Exhibits 4-A -- and the 4-A -- of course and 6-A -- I would offer Exhibits 4-A, 6-A, 7-A.

With regard to 7-A, Your Honor, the original Exhibit 7 was a letter from Mr. Gagliano to Ryal Poppa, basically responding to Mr. Poppa's memo to him regarding his investigation of Mr. Gagliano -- Mr. Gagliano's allegations. Exhibit 7-A is strictly the memo from Poppa to Gagliano. The cover letter, which was Mr. Gagliano's response, did not make any specific references to retaliation so we basically eliminated that part of the document with exhibit -- in its entirety, so we'd offer -continuing with my offer, I would offer 7-A, 8-A, and 9-A.

In support of my offer, Your Honor, I would submit to the Court these documents are basically what I would characterize as semi-contemporaneous recordings of the event. They reflect Mr. Gagliano,s reflections of what occurred during the course of his conversation with Tonda Franklin in which she alleges that she advised him -- because he threatened to go to the EEOC, she -- she had talked to Tavia Campbell and he would not be considered for the two organizational development positions nor any other positions with StorageTek.

MR. SEELEY: Your Honor, this is indeed a scaled-down version of what was several hundred pages, I believe, and therefore are excerpts from the Exhibits 4 through 9. Generally speaking, our argument is the same relative to the documents, that they are nothing but a cumulative rehash of what plaintiff has begun with in his direct testimony, I'm sure will continue with today, that they are not contemporaneous.

This document, the first one, that would be the oldest, is dated March 22nd. The meetings with Miss Franklin were February 4, February 9th and March 8th, so they're not contemporaneous notes nor made from them. The -- there is a -- at page 14, which is in the Exhibit 4-A, a -- indeed a reference to retaliation. I submit that that is the plaintiff's view of his meetings. I've no qualms that Mr. Gagliano will stick in what his view of those meetings is today, because that's exactly where we left off yesterday. He was about to meet with Miss Franklin.

As to the letter to Mr. Poppa, I think the whole point of this is it does not reference retaliation. This is now Exhibit 6-A is sort of a downward theory here. There was no investigation. Clearly there was significant investigation, one of which represented 7-A, which is Mr. Poppa's letter in return to Mr. Gagliano.

So to the extent that the argument is, "I spoke with him, I've made it known my grievances," I think he's going to say that. He's also going to say he didn't get any response. Well, that's -- this is evidence as a response if he does say that he didn't get response, we may be forced to use this for cross purposes.

And last is the 8-A and 9-A. 8-A is a 1996 letter to Laurie Dodd, vice president of human resources, that's a guess at some portion of the second page of it does reference retaliation, and Miss Dodd is not available for rebuttal on this. She's in New York for our shareholders meeting. So it is, again, way out of time, nothing but a rehash of the testimony I assume he will make today and completely irrelevant. It is, again, a piece of document submitted, I believe, in this case to -- Mr. Poppa is also not here to testify.

THE COURT: Thank you. The purpose of the offer, as I understand it, is that the statements are offered as a contemporaneous writing that was created by the plaintiff at the time and under the emotion of the events, but by the very dates it is not -- it doesn't fall within that evidentiary ruling.

You're correct, Mr. Seeley, in that respect, so I have to look elsewhere for reason to receive them and we're talking about the hearsay. The rules that prohibit the offer of hearsay, unless it falls within some sort of exception or is not hearsay under 801 of the hearsay rules.

Frankly, the other area I was looking for, Mr. Baca, was whether or not any of these letters would establish and rebut the assertion by the defense that a demand for consideration for the job was being asserted, but I haven't heard that in any of the arguments, nor do I see it in the documents that any reference to the organizational development jobs, or other jobs within the organization, were maybe -- that would constitute some sort of notice, so I think all of these things may be testified -- or subject to being testified to, and maybe subject to being used by way of rebuttal in the event that there's any challenge to the notion

that letters were written or demands were made upon the company, but I don't think there is.

Largely what these would be offered for, I suspect, is the ability to present the written form, the arguments that the plaintiff wishes to make here before the Court in person, and, of course, we do not -- he doesn't have an ability to argue. That's Mr. Baca's job.

He can testify to the facts, expounding what he did, and I suspect there's really no challenge about these, the fact that the letters were written and letters were received by way of demand, but we have to look now at the relevance of those items to the claims, and the claim here is one of retaliation, as I understand it, and we don't see how they exercise in grievance procedures relates to the retaliation claim that is before the Court for consideration at this point.

Now having said that, some of these letters, for example, a letter by Ryal Poppa is a letter written in response. It's a letter from an agent of StorageTek doing his duties and in a representative capacity, investigating a request for investigation by the plaintiff. And it seems to me that that letter is subject to being received for whatever admissions are contained within that letter against interest or at least stating the official position of StorageTek toward the claims asserted by the -- the plaintiff in this letter.

I would notice also the letter contains a lot of characterizations, and they need to -- that are certain would certainly reflect the anger and upset of Mr. Gagliano during that -- that particular time. So I think 7-A is a document that may be offered as something received by Mr. Gagliano

pursuant to his request for an investigation, and as response sent out by StorageTek to his request.

9-A I think has already been testified about. It is part of a document Mr. Gagliano stood and drew on the paper a -- a version of 9-A, which is before -- before the --

MR. BACA: Your Honor, the purpose of 9-A is that this is the method of presentation that he used within his session with Ryal Poppa. The important part of the document is the second page where he as one of his topics. If you'll recall the exhibit, there was two pages where he listed under his symptom disease format about eight or nine different issues, and that one of -and was the retaliation claim that he made with regard to Tonda Franklin document is basically offered to show this was the method he used, that's what they talked about, this is one of the issues they talked about during the meeting, this open-door meeting.

MR. SEELEY: And, Your Honor, I --

THE COURT: I don't have a problem with you using that as part of your --

MR. BACA: We haven't got to that point in his testimony yet, Your Honor.

THE COURT: You'll introduce something that was submitted at that time by your client, which they responded, if it makes it more clear.

MR. SEELEY: My objection to 9-A, in addition to what you say its entire presentation that is merely a rehashing

of the statement that Mr. Gagliano has already made and contains within it the indication as to Miss Franklin's statement coming from Tavia Campbell, which I fully expect him to try to say today, and I will object as hearsay that Tavia said to Tonda this or that and he's here and Miss Campbell is not going to be here to testify. Miss Franklin will be -- Miss Franklin will be and she can respond to whatever it is that Mr. Gagliano has to say.

I will be happy to stipulate in 7-A.

THE COURT: Well, the issue concerning -- I'm not sure the context -- the foundation has to be laid, of course. Tavia Campbell approaches Mr. Gagliano and says Mr. Gagliano, X, Y and Z is true, I'm saying this as the head of human relations for this company and this is the official position of StorageTek. Obviously as an employee, as an executive of the company, she has agency power, is repeating what she says doesn't fall within a hearsay -it's not excluded by hearsay. I assume, though, from what I'm hearing is it is that Mr. Gagliano has a meeting with Tonda Franklin, and Miss Franklin says, "I am the agent of StorageTek with regard to our meeting. I'm appointed to discuss this matter with you and my boss has told me to tell you this." I think the same applies. I don't think it's hearsay.

And that she's acting in an agency position with regard to the company, although there is the aspect that she was told to say that by someone and she's attributing it to someone else, but she can come in and deny it, say it never -- never occurred, and it's a fabrication and whatnot.

MR. SEELEY: I understand what you're saying. I

hope you don't mind if I make the objection, nevertheless, at that time.

THE COURT: Yeah. You know, I think Mr. Gagliano could come in and say the president of the StorageTek told me the moon is made out of green cheese, and the subject -the very important part in our discussion was green cheese and moons, and it's my employment, and I think he's -- I think he would say that if this was that was the official position in his view of StorageTek -- it's not a very good example. I'm sorry.

The other observation I make is that the document 9-A is, in fact, contemporaneous in that it was prepared at the time of the meeting with Mr. Poppa. I think I've got that right, so let's review this.

Plaintiff has attempted to redact to focus on the retaliation claim, Court persists in its ruling with regard to 4-A, which has ruled in limine and is not a contemporaneous document, does not fall within relation to the hearsay rule, and I can't find any other reason to think of another reason to admit it. The same applies to -- I think 6-A can come in as well. That's the request for hearing with Mr. Poppa, isn't it?

MR. BACA: Yes, it is. It is his request.

THE COURT: 6-A can come in. Mr. Poppa's response at 7-A, 8-A is excluded and way beyond anything that's at issue here. And 9-A can come in as part of what was submitted to Mr. Poppa. All right?

(Plaintiff's Exhibit Nos. 6-A and 9-A are received into evidence.)

MR. BACA: Your Honor, you want me to offer them during the course of the testimony or can I understand it they're in now?

THE COURT: They're in now. I'll give Mr. Seeley a continuing objection to the use of these documents.

MR. SEELEY: Thank you, Your Honor.

MR. BACA: I have nothing further, Your Honor.

THE COURT: Well, hopefully we can get started soon. If you'll excuse me, I think I'll go back and keep looking at your tendered instructions.

(Trial proceedings recessed 9:40 a.m. to 10:04 a.m.)

(The following proceedings were held in the presence of the jury.)

THE COURT: When we recessed for the evening, the testimony of Mrs. Sheck had completed and Mr. Gagliano, the plaintiff, has taken the stand again for more direct examination by Mr. Baca.

MR. BACA: Thank you, Your Honor.